**QORTI CIVILI PRIM`AWLA**
**(GURISDIZZJONI KOSTITUZZJONALI)**

**ONOR. IMHALLEF**
**JOSEPH ZAMMIT McKEON**

**Illum il-Hamis 31 ta` Ottubru 2019**

**Kawza Nru. 1**
**Rik. Nru. 113/2018 JZM**

**Gerald Camilleri (KI 426780M)**
**u martu Rayline Camilleri**
**(KI 221384M)**

***kontra***

**Avukat Generali**

***u***

**Alphonse Camilleri (KI991446M)**
**u martu Maria Assunta Camilleri**
**(KI522146M)**

**Il-Qorti :**

**I. <u>Preliminari</u>**

Rat ir-rikors prezentat fil-15 ta` Novembru 2018 li jaqra hekk :–

*Illi r-rikorrenti huma propjetarji tal-fond 39 Detroit, Creche Street, Sliema li huma akkwistaw b`kuntratt tat-30 ta` Mejju 2017 fl-atti tan-Nutar Dottor Rachel Busuttil li kopja tieghu qed jigi hawn anness u mmarkat bhala "Dok A".*

*Illi b`kuntratt ta` emfitewsi temporanja tal-24 ta` Marzu 1977 fl-atti tan-Nutar Dottor Mario Bonello li kopja tieghu qeghda tigi hawn annessa u mmarkata bhala "Dok. B", l-antekawza tal-esponenti taw b`titolu ta` koncessjoni enfitewka ghal 21 sena, l-fond imsemmi taht il-pattijiet tu l-kundizzjonijiet kollha hemm stipulati, bic-cens annwu u temporanju ta` Lm60 fis-sena dekorribbli mil-1 ta` April 1977.*

*Illi din il-koncessjoni emfitewtika temoranja skadiet fil-31 ta` Marzu 1998 u peress li l-intimati Camilleri kienu cittadini Maltin u ordinarjament residenti fil-fond imsemmi a tenur tal-Kap 158 tal-Ligijiet ta` Malta ossija Artikolu 12(2)(b)(i) l-intimati kellhom d-dritt jikkonvertu b`titolu ta` kera l-emfitewsi li tkun ghadha kemm spiccat b`kera li jkun daqs ic-cens li kien jithallas minnufih qabel ma tkun ghalqet l-emfitewsi mizjud fil-bidu tal-kirja li jkun ammont mhux izjed minn dak ic-cens li kien jithallas lill-attrici li jirraprezenta bi proporzjon ghal dak ic-cens iz-zieda fl-inflazzjoni minn meta c-cens li ghandu jizdied gie stabbilit l-ahhar u hekk jerga` jizdied kull 15-il sena sussewwenti sakemm tibqa` l-kirja favur l-istess intimati u/jew favur min ghandu d-dritt jiret il-kirja a tenur ta` l-istess ligi.*

*Illi ghalhekk a tenur ta` l-istess ligi il-kera tal-fond sa Lm120 u dan mill-1 ta`April 1998 u rega` zdied fl-1 ta` April 2013 ghal Lm240 fis-sena ekwivalenti ghal EURO 559.05c u rega` zdied ai termini tal-Att X tal-2009 fl-1 ta` April 2016 ghal EURO 570.59c u jerga` jizdied fl-1 ta` April 2019 u ai termini tal-AttXXVII tal-2018.*

*Illi l-fond in kwistjoni kien fond dekontrollat kif jirrizulta mic-certifikat mahrug mil-Land Valuation Office hawn anness u mmarkat bhala dokument C.*

*Illi l-atturi jippretendu illi huma qieghdin jigu mcahhda mit-tgawdija ta` hwejjighom u li l-kundizzjonijiet imposti mil-Artikolu 12 tal-Kap 158 tal-Ligijiet ta` Malta huma sproporzjonati ghall-ghanijiet ta` l-istess ligi iktar u iktar meta l-fond kien fond dekontrollat u ghalhekk qatt ma setghu jippretendu li b`ligi infami tal-At XXIII tal-1979 id-drittijiet taghhom jigu radikalment mibdula u ma jkunux jisghu jizgumbraw lill-intimati mil-fond taghhom stante li l-ligi proteggithom fl-okkupazzjoni ta` hwejjeg l-atturi jew l-antekawza minnhom.*

*Illi l-isproporzjon jikkonsisti fil-fatt li l-valur lokatizju tal-fond fit-terminazzjoni tal-koncessjoni emfitewtika temporanja ma kienx dak kif stabbilit fil-ligi imma ferm aktar u ghax proceduralment sabu ruhhom iffaccjati b`ligi li pprotegiet lill-okkupanti fil-propjeta` tar-rikorrenti.*

*Illi inoltre, giet imposta fuq l-atura u l-antekawza minnhom r-relazzjoni gdid mal-inkwilini intimati Camilleri ghal perjodu indefinit stante illi dan kellu jigi mgedded minn hmistax-il sena ghal hmistax-il sena, oltre li mhemmx rimedju effettiv biex jiehdu lura l-pussess tal-fond jekk per ezempju ghandhom bzonn il-fond ghal uzu personali taghhom jew tal-qraba taghhom. L-anqas ma jezistu u dawk tas-sidien u hija remota fermi l-possibilita`li l-kerrej jittermina l-kirja volontarjament.*

*Illi effettivament qabel ma dahlet fis-sehh l-Att XXIII ta` l-1979 wara l-iskadenza ta` koncessjoni emfitewtika temporanja l-intimati Camilleri kienu effettivament jigu zgumbrati mil-fond in kwistjoni u bl-effetti tal-ligi fuq imsemmija dan ma baqghax aktar posibbli galadarba l-intimati kienu citadini Maltin u ordinarjament residenti fil-fond in kwistjoni.*

*Illi ghalhekk effettivament ir-rikorrenti jew l-antekawza minnhom gew spossessati mid-dritt ta` uzu tal-propjeta` taghhom, wara li skada t-terminu emfitewtiku u ghalhekk gew assoggettati ghal relazzjoni forzata ta` sid u inkwilin ghal perjodu indefinit u ghalhekk intilef il-bilanc bejn l-interessi ta` l-inkwilini u dawk tas-sidien `multo magis` meta l-kera stabbilita hija rrizorja.*

*Illi b`dan il-mod, ir-rikorrenti gew imcahhda mit-tgawdija tal-propjeta` taghhom, minghajr ma gew moghtija kumpens xieraq ghat-tehid tal-pussess ta` l-istess fond u infatti l-unika kumpens li gie offrut kien li jithallas iz-zieda fir-rata ta` l-inflazzjoni pero` qatt iktar mid-doppju wara l-gheluq tal-perijodu tal-emfitewsi fl-1 ta` April 1998.*

*Illi fil-fatt, il-valur lokatizzju ta` l-istess fond, dak iz-zmien tat-terminazzjoni ossija fl-1 ta` April 1998 kif ukoll illum, kien hemm ferm ghola minn dak moghti lilhom bl-Att XXIII ta` l-1979 u dan kif ser jirrizulta waqt it-trattazzjoni ta` din il-kawza.*

*Illi huma ghalhekk huma pprivati mil-propjeta` taghhom stante illi skont il-principji stabbiliti mil-Konvenzjonji Ewropeja, l-principju tal-legalita` jippresupponi illi l-applikazzjoni tal-provvedimenti tal-ligi domestika, ghandhom ikunu sufficjentement accessibli, precizi u li wiehed ghandu jistenna fi stat demokratiku fl-applikazzjoni taghhom – vide* ***Broniowksi vs. Poland (GC)*** *no.31443/96, 147, ECHR 2004-V and Saliba vs Malta, no. 4251/02, 31, 8 November, 2005 u* ***Amato Gauci vs. Malta****—Applikazzjoni No.47045/06 deciza fil-15 ta` Settembru, 2009.*

*Illi fic-cirkostanzi, meta r-rikorrenti kienu ftiehmu fuq il-koncessjoni emfitewtika temporanja l-okkazjoni lill-inkwilini intimati jippretendu li ghandhom ma kenux iktar decizi fuq kriterji ta` kondizzjonijiet gusti billi l-Kap 158 Arikolu 12 tal-istess ligi mponietilhom li jircievu kera irrizorja mhux skond is-suq u li ma tirreflettix il-valur lokatizju tal-fond, liema ligi ghalhekk ma krejatx bilanc tar-rekwizit tal-principju ta` proporzjonalita oltre l-fatt li proceduralment tbiddlu l-ligijiet li radikalment biddlu l-portata rigward l-okkupazjoni tal-okkupandi wara t-terminazzjoni tal-koncessjoni emfitewtika temporanja.*

*Illi principju massimu li ghandu jigi sewgit, hli li l-individwu m`ghandux jigi assoggettat ghal legislazzjoni li ggib toqod u telf. Ezagerat ukoll fil-kumpens li ghandu jircievi ghat-tehid effettiv tal-propjeta` tieghu kif gara f`dan il-kaz. – vide* ***Sporrong and Lonroth vs. Sweden*** *(1982), 69-74 u* ***Brumarescu vs Romania*** *(GC) no. 28342/95, 78, ECHR 1999-VII u* ***Spadea and Scalabrino vs. Italy****, deciza fit-28 ta` Settembru,*

*1995, 33, Series A no.315 – B u* ***Immobiliare Saffi v s Italy*** *(GC) no. 22774/93, 54, ECHR 1999-V and Broniowski -151)*

*Illi konsegwentament a tenur ta` l-Arikolu 41 tal-Konvenzjoni Ewropeja, gialadarba kien hemm ksur ta` Artikolu 1 ta` l-Ewwel Protokoll tal-Konvenzjoni Ewropeja, l-intimati ghandhom ihallsu kumpens biex ikun hemm sodisfazzjon gust lir-rikorrenti ghal hsara minnu sofferti u dan kif gie deciz mil-kawza deciza mill-Prim Awla tal-Qorti Civili fit-18 ta` Settembru 2012 fl-ismijiet* ***"Dr. Cedric Mifsud et vs Avukat Generali et" kif ukoll deciza mil-Qorti ta` l-Appell Kostituzzjonali tal-25 ta` Ottubru 2013*** *u* ***Applikazzjoni nru. 50570/2013 "Cassar vs MALTA" deciz mil-Qorti Ewropeja tad-Drittijiet Fundamentali tal-Bniedem, Raba` Sezzjoni fit-30 ta` April 2018.***

*Illi ghalhekk ir-rikorrenti huma ntitolati ghal kumpens minhabba t-telf tal-kontroll, uzu u tgawdija tal-propjeta` taghhom minn meta huma ma setghux jiehdu lura l-propjeta` taghhom minhabba l-legislazzjoni intavolata bl-Att XXIII ta` l-1979 u dan mil-1 ta` Settembru, 1984 – vide* ***Kingsley vs. The United Kingdom*** *(GC) no. 35605/97, 40, ECHR 2002-IV;* ***Runkee and White vs. The United Kingdom –*** *Nos. 42949/98 u 53134/99, 52, deciza fl-10 ta` Mejju, 2007;* ***Akkus vs. Turkey –*** *deciza fid-9 ta` Lulju, 1997, reports 1997-IV, 35;* ***Romancenko vs. Ukraine*** *– No. 5596/03, 22 ta` Novembru, 2005, 30, unpublished;* ***Prodan vs. Moldova*** *– No. 49806/99, 73, ECHR 2004-III (extracts);* ***Ghigo vs. Malta*** *– No. 31122/05, 20, deciza 17 ta` Lulju 2008.*

*Illi r-rikorrenti jhossu illi fir-rigward taghhom gie miksur l-Artikolu 37 tal-Kostituzzjoni ta` Malta, kif ukoll l-ewwel Protocol tal-Konvenzjoni Ewropeja u konsegwentament ghandhom jithallsu kumpens a tenur ta` l-Artikolu 41 tal-Konvenzjoni Ewropeja, stante illi huma gew privati, minghajr ma nghataw kumpens gust ghat-tgawdija tal-propjeta` taghhom u cioe` tal-fond 39, Detroit, Creche Stret, Sliema minhabba d-disposizzjonijiet ta` l-Artokolu 12 tal-Kap. 158 l-Ligijiet ta` Malta, kif emendat bl-Att XXIII ta` l-1979.*

*Ghaldaqstant, l-esponenti jitolbu bir-rispett lil din l-Onorabbli Qorti prevja kwalsiasi dikjarazzjoni necessarja u opportuna u ghar-ragunijiet premessi l-intimati jghidu ghaliex m`ghandhiex :*

*1. Tiddikjara u tiddeciedi ili fil-konfront tar-rikorrenti l-operazzjonijiet ta` l-Artikolu 12, 12A u 12B tal-Kap. 158 tal-Ligijiet ta` Malta kif emendat bl-att XXIII ta` l-1979, bl-Att X tal-2009 u bl-Att XXVII tal-2018 u bl-operazzjonijiet tal-ligijiet vigenti qeghdin jaghtu dritt ta` rilokazzjoni lill-intimati Camilleri il-fond 39 Detroit, Creche Street, Sliema u jirrenduha impossibbli lir-rikorrenti li jirriprendu l-pussess tal-propjeta`.*

*2. Konsegwentement tiddikjara u tiddeciedi illi qed jigu vjolati d-drittijiet taghhom ghat-tgawdija tal-propjeta` taghha fil-fond 39 Detroit, Creche Street, Sliema bi vjolazzjoni ta` l-Artikolu 37 tal-Kostituzzjoni u l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni Ewropeja (l-Ewwel Skeda tal-Kap. 319 tal-Ligijiet ta` Malta) u b`hekk taghtihom ir-rimedju li jidhrilha xierqa fis-sitwazzjoni.*

*3. Tiddikjara u tiddeciedi illi l-intimati jew min minnhom huma responsabbli ghal kumpens u danni sofferti kemm pekunjarji kif ukoll non pekunjarji lir-rikorrenti b`konsegwenza ta` l-operazzjonijiet ta` l-Att XXIII ta` l-1979 li ma kreawx bilanc gust id-dritttijiet tas-sid u dak tal-inkwilin, stante illi ma jirriflettux is-suq u lanqas il-valur okatizju tal-proprjeta` in kwistjoni ai termini ta` l-Arikolu 41 tal-Konvenzjoni Ewropeja.*

*4. Tillikwida l-istess kumpens u danni kif sofferti mir-rikorrenti, ai termini ta` l-Artikolu 41 tal-Konvenzjoni Ewropeja.*

*5. Tikkundanna lill-intimati jew minn minnhom ihallsu l-istess kumpens u danni likwidati ai termini ta` l-Artikolu 41 tal-Konvenzjoni Ewropeja.*

*Bl-ispejjez, komprizi dawk ta` l-ittra ufficjali tal-10 ta` Awwissu 2017, hawn annessa u mmarkata bhala Dok. B u bl-ingunzjoni ta` l-intimati ghas-subizzjoni.*

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

Rat ir-risposta li l-intimati konjugi Camilleri pprezentaw fl-14 ta` Dicembru 2018 li taqra hekk :-

*1. Illi b`mod preliminari, l-intimati, filwaqt li jistqarru li l-pretensjonijiet u d-drittijiet vantati mir-rikorrenti qieghdin jigu kkontestati bil-qawwa, jikkontendu lil din l-Onorabbli Qorti ghandha tichad it-talbiet tar-rikorrenti fl-intier taghhom b`dan illi tirrifjuta li tisma` l-istess talbiet fuq il-mertu u dan propju ghaliex ghandu jirrizulta bhala stat ta` fatt inekwivouku u objettiv li r-rikorrenti kellhom, u ghad ghandhom, rimedju ordinarju disponibbli lilhom skond il-ligi.*

*2. Illi inoltre, it-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt ghaliex il-ligi ordinarja tikkontempla diversi cirkostanzi fejn kirja krejata taht l-operat tal-Artikolu 12 tal-kap 158 tal-Ligijiet ta` Malta ghandha tintemm u meta l-istess kerrejja ghandhom jizgumbraw il-fond bi dritt ta` ripresa lis-sidien tal-propjeta`. Certament, u fl-umli opinjoni tal-esponenti, ma huwiex kompitu ta` din l-Onorabbli Qorti li tqis u tivverifika jekk tali cirkostanzi humiex prezenti fil-kas odjern stante li dan l-ezercizzju jaqa prettament fil-kompetenza tal-Bord li Jiregola l-Kera skond ma ried il-legistratur.*

*3. Illi fil-mertu, u minghajr ebda pregudizzju ghall-eccezzjonijiet preliminari suesposti, l-esponenti ghandhom titolu validu ta` kera skont l-artikolu 12 et seq. Tal-Kapitolu 158 tal-Ligijiet ta` Malta (Ordinanza li tnehhi l-kontroll tad-Djar) u l-istess rikorrenti kienu ben konxji tad-dritijiet tal-intimati meta huma akkwistaw il-propjeta` mertu tal-kaz odjern fit-30 ta` Mejju tas-sena 2017 u ghalhekk ghandhom jitqiesu li accettaw li-istatus tal-intimati (qua kerejja tal-fond) taht l-istess cirkostanzi li kienu prezenti fiz-zmien li ppreceda l-akkwist tal-fond de quo da parti tar-rikorrenti.*

*4. Illi bid-dovut rispett ir-rikorrenti ma jistghux jippretendu li jidhlu fiz-zarbun tas-sidien precedenti bili jistqarru li d-drittijiet taghhom gew vjolati bl-emendi fil-ligi tal-1979 u jimplikaw li ma kienux konoxxenti li drittijiet taghhom kienu ser jigu radikalment mibdula. Fil-fatt, il-fatti hekk rikapitulati fir-rikors promotor tar-rikorrenti huma inaplikabbli ghal kaz odjern ghaliex l-istess rikorrenti ma kellom ebda` konnessjoni mal-fond in kwistjoni qabel ma xtraw l-istess f`Mejju tas-sens 2017 u ghalhekk ma kellhom ebda interess guridiku Abel l-istess data u kwalunkwe dritt ta` azzjoni li hija msejsa fuq kunsiderazzjonijiet li min-natura taghhom stess kienu applikabbli biss qabel id-data tax-xiri semmai jispeta lis-sidien precedenti, u mhux lir-rikorrenti.*

*5. Illi huwa car li r-rikorrenti b`rieda libera taghhom u minghajr kwalsijasi forma t`impozizzjoni mhux biss ghazlu li jixtru l-propjeta` minghajr il-pussess vakanti tal-istess fond, <u>kif kjarament dikjarat fl-att ta`xiri</u>, izda sahanstira uzaw l-istess stat ta` fatt biex jinnegozjaw u jottjenu prezz ridott ghall-akkwist tal-propjeta`, maisonette, li kumparata mal-valur attwali li din iggib fuq is-suq ta` llum giet mixtrija ghal prezz skarn ta` tmienja u sittin elf euro (€68,000).*

*6. Illi dan maghdud, huwa minn ewl id-dinja li l-istess rikorrenti ghamlu gwadann konsiderevoli mil-fat finanzjarju bil-forsa tal-istess ligijiet li, skond huma, qed jivvjolaw id-drittijiet fondamentali taghhom. Ghalhekk, wiehed ma jistax ma jirrimarkax illi f`dan il-kaz huwa car li r-rikorrenti qieghdin jabbuzaw bil-proceduri kostituzzjonali f`atentat li jinqdew bihom sabiex jiksbu vantagg li ma haqqomx.*

*7. Illi ma kien ebda tehid tal-propjeta` li jikkostitwixxi ksura tal-artikolu 37 tal-Kostitizzjoni u tal-ewwel (1) artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropeja u r-rikorrenti ma ghandhom ebda dritt kwezit ghal propjeta` vakanti.*

*8. Illi wkoll, u minghajr pregudizzju ghas-suespost, ir-rata tal-kera li qieghda prezentement tithallas u l ser tizdid fis-sena 2019, mhux biss ghandha titqies bhala accettata mir-rikorrenti bl-att t`akkwist izda*

*hija wahda gusta tenut skont l-aspett socjali tal-kaz odjern, hekk kif (i) l-intimati huma zewg pensjonanti, (ii) l-propjeta` in kwistjoni hija r-rezidenza ordinarja taghhom u (iii) l-esponenti m`ghandhom ebda` propjeta` ghajr l-imsemmi fond li huma qed jikru minghand ir-rikorrenti. Bizzejjed jinghad ukoll illi tali rata ta` kera teccedi ferm l-ammont ta`mitejn u wiehed ewro u disgha u tletin centezmu (201.39) fis-sena li tithallas illum il-gurnata, skont il-Kodici Civili, mit-titolarji ta` kirjiet protetti.*

*9. Illi minghajr pregudizzju ghas-suespost ghalkemm ghandu jirrizulta li r-rikorrenti acettaw l-istatus tal-intimati bhala kerrejja tal-fond u anke accettaw ir-rata ta`kera kif imhallsa bl-att ta` xiri, b`emendi recenti fil-ligi l-istess rikorrenti jistghu jitolbu lil Bord li Jirregola il-Kera – dejjem jekk l-istess Bord jikkunsidra li l-intimati m`ghandhomx jigu zgumbrati – zieda fil-kera pagabbli. Ghalhekk, is-sitwazzjoni legali tar-rikorrenti sahanstira qalbet ghall-ahjar minn meta huma xtraw il-fond u ghaldaqstant anke ghal din ir-raguni l-allegazzjonijiet tar-rikorrenti dwar xi ksur ta` drittijiet fondamentali taghhom huma minghajr bazi.*

*10. Illi minghajr pregudizzju ghall-permess, l-applikazzjoni, f`dan il-kaz, tal-artikolu 12 tal- Kap. 158 et seq tal-Ligijiet ta` Malta, ma ghandux jigi dikjarat bhala leziv ghad-drittijiet tar-rikorrenti, tenut kont tac-cirkostanzi socjali u finanzjarji tal-esponenti u l-kuntest fattwali tal-proceduri odjerni, aktar u aktar meta wiehed jikkunsidra illi l-fond in kwistjoni ma nxtrax mir-rikorrenti sabiex iservi bhala r-residenza ordinarja taghhom izda inxtara biss sabiex jaqdi skop kummercjali.*

*11. Illi ghalhekk il-kontroll ta` uzu tal-propjeta` in kwistjoni da parti tal-Gvern ta` Malta hija mizura legittima, u tabilhaqq isservi ghan socjali. Konsegwentament, ma jezisti l-ebda zbilanc bejn l-interessi tar-rikorrenti u dawk tal-esponenti li jimmerita dikjarazzjoni ta` ksur tal-artikolu 37 tal-Kostituzzjoni u/jew tal-ewwel artikolu tal-Ewwel Protokol tal-Konvenzjoni.*

*12. Illi minghajr pregudizzju ghas-suespost l-esponenti, minkejja li jirrikonoxxu l-interess guridiku taghhom fil-proceduri odjerni, jikkontendu illi bhala cittadin privati ma jistghu qatt jitqiesu responsabbli*

*ghal kwalsiasi allegat vjolazzjoni ta` drittijiet fondamentali imwettqa mil-Gvern ta` Malta u/jew xi dipartimenti taht il-kontroll tal-Gvern u fil kwalunkwe kaz l-esponenti ma lledew l-ebda drittijiet fondamentali tar-rikorrenti.*

*13. Illi finalment, dato ma non concesso li din l-Onorabbli Qorti tikkunsidra li d-drittijiet tar-rikorenti setghu gew vjolati, r-rimedju tar-rikorrenti ma ghandux ikun l-izgumbrament tal-intimati u tali kwistjoni ghandha tigi kkunsidrata u sindakata mil-Bord li Jirregola l-kera kif titlob il-ligi.*

Rat il-lista tax-xhieda.

Rat ir-risposta pprezenta l-intimat Avukat Generali fil-<u>5 ta` Dicembru 2018</u> li taqra hekk :-

*1. Illi t-talbiet tar-rikorrenti ghandhom jigu michuda in toto peress li huma nfondati fil-fatt u fid-dritt u dan ghar-ragunijiet segwenti li qed jigu hawn elenkati minghajr pregudizzju ghal xulxin.*

*2. Illi l-ewwel u qabel kollox, ir-rikorrenti ghandhom igibu prova car tat-titolu taghhom sabiex juru li huma l-propjetarji tal-fond in kwistjoni kif qed jallegaw fir-rikors promotur.*

*3. Illi mir-rikors promotur jidher li r-rikorrenti saru sidien tal-fond fit-<u>30 ta`Mejju 2017</u> u ghalhekk, l-ilment kostituzzjonali u konvenzjonali taghhom jista` jigi kkunsidrat <u>mid-data ta` meta r-rikorenti saru s-sidien tal-fond mertu ta`dan il-kaz</u> u mhux qabel.*

*4. Illi l-esponent jixtieq jigbed l-attenzjoni ta` din l-Onorabbli Qorti fuq il-fatt li r-rikorrenti kienu ben konxji li fil-propjeta` li kienu qed jixru kienet tghammar koppja anzjana, u issa qed jinqdew b`dawn il-proceduri kostituzzjonali specjali biex din il-koppja tigi zgumbrata (ara klawsola numru 3 tal-kuntratt anness mar-rikors promotor u mmarkata*

*bhala `Dok A`). Huma xtraw il-propjeta` b`ghajnejhom miftuha u mhux sewwa li koppja anzjana tigi mitfugha barra fit-triq meta r-rikorenti mponew fuqhom infushom din ic-cirkustanza, u ghalhekk imputet sibi.*

*Rigward l-Artikolu 37 tal-Kostituzzjoni u l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni*

*5. Peress li r-rikorrenti qed jinvokaw il-protezzjoni tal-Artikolu 37 tal-Kostituzzjoni, l-esponent qed jeccepixxi l-improponibilita` tal-Artikolu 37 tal-Kostituzzjoni u dan peress li dan l-partikolu japplika biss f`kaz ta` tehid forzuz tal-propjeta`. Sabiex wiehd jista` jitkellem dwar tehid frozuz jew obbligatorju, persuna trid tigi zvestita jew spussessata minn kull dritt li ghandha fuq dik il-propjeta` u mhux tircievi kera ta` 570.09 fis-sena, liema kera ser terga` trizdied fl-1 ta` April 2019 u ai termini tal-Att XXVII tal-2018. Huwa evidente li fil-kaz prezenti, ali zvestiment ma sarx u r-rikorrenti ma tilfux ghal kollox il-jeddijiet taghom fuq il-fond in kwistjoni u ghalhekk dan il-kaz ma jammontax ghal deprivazzjoni totali tal-propjeta`. L-istat ha mizura li tinkwadra ruhha taht kontroll ta` uzu fejn irregolarizza sitwazzjoni ta` natura socjali fl-ambitu tal-gid komuni b`dana pero`li jibqghu mpregudikati d-drittijiet tas-sidien. Fid-dawl ta` dan kollu, l-ilment tar-rikorrenti ma jinkwadrax ruhu fil-parametri tal-artikolu 37 tal-Kostituzzjoni u ghandu jigi michud.*

*6. Illi f`kaz li din l-Onorabbli Qorti tara li l-Artikolu 37 huwa applikabli ghal dan il-kaz, xorta jiba` l-fatt li ma hemm ebda ksur tal-Artikolu 37 tal-Kostituzzjoni u tal- Ewwel Artikolu tal-Ewwel Protokol tal-Konvenzjoni Ewropea stante li l-Artikolu 12, 12A u 12B tal-Kap. 158 kif emendat bl-Att XXIII tal-1979, bl-Att X tal-2009 u bl-Att XXVII tal-2018 u bl-operazzjonijiet tal-ligijiet vigenti, ma jikkostitwixxux tehid forzuz jew obbligatorju tal-propjeta` izda jikkostitwixxu biss kontroll ta` uzu ta` propjeta` fil-parametri tal-Kostituzzjoni u tal-Konvenzjoni Ewropeja.*

*7. Illi safejn l-ilment tar-rikorrenti huwa msejjes fuq l-Ewwel Artikolu tal- Ewwel Protokol tal-Konvenzjoni Ewropeja, l-esponenti jirrileva li skont il-proviso tal-istess artikolu, l-Istat ghandu kull jedd li jghaddi dawk il-ligijiet li jidhrulu xierqa biex jikonstrolla l-uzu tal-propjeta` skont l-interess generali. Anski skont il-gurisprudenza kostanti tal-Qorti ta`*

*Strasbugu, l-Istat igawdi diskrezzjoni wiesgha sabiex jidentifika x`inhu mehtieg fl-interess generali u x`mizuri ghandhom jittiehdu sabiex jigu ndirizzati dawk il-htigijiet socjali.*

*8. Illi tali diskrezzjoni tal-legislatur m`ghandhiex titbiddel sakemm din ma tkunx manifestament minghajr bazi ragonevoli – li zgur ma hux il-kaz ghaliex hemm bazi ragjonevoli li tiggustifika l-promulgazzjoni tal-legislazzjoni li tinsab taht skrutinju fil-kawza odjerna. Qabel ma dahal fis-sehh l-Att XXIII tal-1979, wara l-iskadenza ta` koncessjoni enfitewtika temporanja, l-intimati Alphonse u Assunta konjugi Camilleri kienu jkunu zgumbrati mil-fond in kwistjoni.*

*9. Illi kienet dik ir-raguni wara l-promulgazzjoni tal-Att XXIII tal-1979, li jikorpora emendi ntizi sabiex jipprotegu persuni milli jigu mkeccija mid-dar ta` abitazzjoni taghhom f`gheluq it-teminu koncess lilhom fil-kuntratt tal-enfitewsi. B`hekk dan l-Att zgur ma jistax jigi kklassifikat bhala wiehed mhux legittimu jew mhux fl-interess generali u l-esponent jara li dan l-Att m`ghandux jitqies li jmur kontra d-drittijiet fundamentali tal-bniedem.*

*10. Illi l-Istat ghamel riforma fil-ligijiet tal-kera bl-introduzzjoni tal-Att XXVII tal-2018, liema riforma gabet aktar rilassament ta` tali ligijiet favor is-sid u assigurat li l-interess generali tal-inkwilini xorta jibqa` protett, b`dan pero` li jinholoq aktar bilanc bejn is-sid u l-inkwilin. Inoltre, permezz tal-Att XXVII tas-sena 2018, l-Artikolu 12B tal-Kap 158 jistipula li r-rikorrenti bhala sidt tal-fond in kwistjoni ghandu d-dtritt li jitlob li l-kera tigi ricevuta ghal ammont li ma jeccedix it-tnejn fil-mija tis-sena tal-valur liberu u frank tas-suq miftuh tad-dar ta` abitazzjoni. Is-Sid jisa` wkoll li jigu stabbiliti kundizzjonijiet godda fir-rigward tal-kera.*

*11. Illi din ir-riforma wkoll qed tigi attakkata mir-rikorrenti li allura ghandhom igibu prova cara ta` kif tali ligi li ghadha kif dahlet fis-sehh qeghda b`xi mod iccahhad lir-rikorrenti mit-tgawdija ta` hwejjighom.*

*12. Illi f`cirkostanzi bhal dawn fejn jezisti interess generali legittimu ma tistax tpoggi fl-istess keffa l-valur tal-propjeta` fis-suq hieles ma dak il-valur li wiehed ghandu jhallas fil-kuntest ta` social housing. Huwa risaput li l-Qorti Ewropea stess fil-gurisprudenza taghha fosthom fil-kaz ta` "<u>Amato Gauci vs Malta</u>" rrikonoxxiet li : "State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and it`s application may often cause significant reductions in the amount of rent chargeable."*

*13. Illi ghalhekk anke fil-kaz odjern hemm tnaqqis fil-kera dovuta lir-rikorrenti meta mqabbla mal-valur lokatizju fis-suq, dan it-tnaqqis huwa kontro-bilancjat bil-magini wiesgha tal-Istat li jillegisla fil-kuntesta ta` mizuri socjali fosthom fil-qasam tad-djar.*

*14. Ma hemm l-ebda dubju li kieku kellu jigi applikat il-prezz tal-kirjiet fis-suq ugwalment u fuq l-istess binarju ghall-binjiet kollha, kemm dawk fl-ambitu tal-qafas socjali u anke fl-ambitu ta` dawk li mhumiex, allura r-rizultat ikun li tinholoq krizi li tghabbi lil hafna familji b`pizijiet li ma jifilhux ghalihom.*

*15. Illi jekk ir-rikorrenti qed jilmentaw li qed jigu pregudikati minhabba l-fatt li l-ammont tal-kera ma jirriflettix il-valur reali tal-fond in kwistjoni, dan ma jistax jigi rrimedjat bl-izgumbrament tal-intimati. Dan qed jinghad ghaliex ma jkunx jaghmel sens li wiehed jaghraf l-iskop, il-htiega u l-legittimita` tal-Artikolu 12 tal-Kap. 158 biex imbghad jinnewtralizzaha billi jaghmilha inapplikabbli bl-izgumbrament tal-okkupant.*

*16. Illi l-Ewwel Artikolu tal-Ewwel Protokol ma jikkoncedi edba dritt li xi hadd jircievi profitt, allura fil-kuntest ta` propjeta` li qed isservi ghall-finijiet ta` social housing zgur li ma jistax jigi kkontemplat xi dritt simili.*

*17. Illi fl-umli fehma tal-esponent, fil-kaz odjern din l-Onorabbli Qorti m`ghandhiex tevalwa din l-ligi fil-kuntest principalment ta` spekulazzjoni tal-propjeta` imma ghandha tiskrutinja u tapplika l-ligi fil-*

*qafas aktar wiesgha u cjoe mil-aspett tal-proporzjonalita` fid-dawl tar-realta` ekonomika u socjali tal-pajjiz in generali.*

18. *Illi jigi enfazizzat ukoll li fil-kazijiet imsemmija mir-rikorrenti fir-rikors promotur, il-Qorti Ewropea kienet waslet ghall-konkluzjoni li kien hemm sproporzjonalita` u tqassim mhux xieraq tal-pizijiet u l-beneficcji biss f`dawk il-kazijiet u f`dawk ic-cirkostanzi parikolari u allura ma stabbilew ebda principja universali. Isegwi ghalhekk li dawn id-decizjonijiet u d-decizjonijiet l-ohra tal-Qorti Ewropeja kkwotati mir-rikorrenti jikkostitwixxu stat biss fil-konfront tal-partijiet f`dawk il-kawzi partikolari – inter partes.*

19. *Illi l-ammont ta` €570.09 fis-sena, liema kera ser terga` tizdied fl-1 ta` April 2019 u ai termini tal-Att XXVII tal-2018, mhix kera daqstant sproporzjonata li permezz taghha r-rikorrenti qed isofru xi pregudizzju u dan ghaliex meta jkun hemm prezenti ghanijiet legiimi mehuda fl-interess pubbliku, il-kumpens dovut lis-sidien minhabba ndhil fit-tgawdija ta` gidhom jista` jkun inqas mil-valur shih tas-suq.*

20. *Salv eccezzjonijiet ulterjuri.*

*Ghaldaqstant, l-esponent jitlob bir-rispett lil din l-Onorabbli Qorti joghgobha tichad il-pretensjonijiet kif dedotti fir-rikors promotor bhala infondati fil-fatt u fid-dritt li r-rikorrenti ma sofrew l-ebda ksur tad-drittijiet tal-bniedem u l-libertajiet fondamentali, u dan bl-ispejjez kontra l-istess rikorrenti.*

Rat id-digriet li tat fl-udjenza tat-12 ta` Frar 2019 fejn kien mahtur il-Perit Mario Cassar bhala perit tekniku sabiex jistma l-valur lokatizju fis-suq tal-fond numru disgha u tletin (39), bl-isem "Detroit", Creche Street, Sliema, mid-data tat-terminazzjoni tal-koncessjoni enfitewtika temporanja, ossia l-1 ta` April 1998 u kull hames snin sad-data tal-prezentata tar-rikors, u cioe` 15 ta` Novembru 2018.

Rat ir-relazzjoni li pprezenta l-perit tekniku, u li kkonferma bil-gurament il-kontenut taghha fl-udjenza tat-28 ta` Marzu 2019.

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza, inkluza l-eskussjoni tal-perit tekniku.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet li pprezentaw il-partijiet.

Rat l-atti l-ohra tal-kawza.

## II. **Provi**

Permezz ta` kuntratt ta` enfitwesi temporanja tal-24 ta` Marzu 1977, l-intimati konjugi Camilleri akkwistaw minghand Carmel u Doris konjugi Bezzina, b`titolu ta` subenfitwesi temporanja, id-dar bl-isem "Detroit", u bin-nru 39, Creche Street, Sliema, ghal zmien ta` wiehed u ghoxrin (21) sena, soggetta ghall-hlas ta` subcens ta` sittin Lira Maltija (Lm 60) pagabbli kull tlett xhur bil-quddiem dekorribbli mill-1 ta` April 1977.

Il-fond in kwistjoni kien dekontrollat.

Permezz ta` kuntratt ta` bejgh tat-13 ta` Mejju 2017, fl-atti tan-Nutar Dr Rachel Busuttil, ir-rikorrenti xtraw u akkwistaw minghand Louis Mallia, Paul Mallia, Josephine Bonello u Carmen Bonello, lkoll ahwa Mallia *the first floor maisonette, with its relative airspace, marked with the official number thirty nine (39), and named `Detroit`, in Creche Street corner with Windsor Terrace, Sliema, free and unencumbered with all its rights and appurtenances*.

L-akkwist sar kif soggett ghall-kondizzjoni illi :

*The property is NOT being sold with vacant possession. The Purchasers are aware that the property is tenanted by third parties.*

Il-kondizzjoni kienet qeghda tirreferi propju ghall-kirja tal-intimati konjugi Camilleri. Fil-fatt irrizulta li dawn ihallsu kera annwa ta` €570.59.

Permezz ta` ittra ufficjali tal-10 ta` Awwissu 2017 il-konjugi Camilleri kienu ntimati mir-rikorrenti sabiex jizgumbraw mill-fond de quo b`mod immedjat u jroddulhom ic-cwievet tal-fond.

Ir-rikorrent Gerald Camilleri xehed illi hu u martu huma s-sidien tal-fond numru 35 li jinsab biswit il-fond mertu ta` din il-kawza. Fisser illi l-fond numru 35 huwa zghir, u ma hemmx spazju bizzejjed fejn jabitaw bhala familja. Ghalhekk kellhom imorru jirrisjedu go dar ohra Haz-Zebbug. Dan holoq inkonvenjent ghax-xoghol tieghu billi huwa bejjiegh tal-haxix u ghandu hanut fil-fond numru 32 fi Creche Street, Sliema. Ighid illi kien akkwistat il-fond numru 39, li huwa okkupat mill-intimati Camilleri, bl-iskop li jghaqqdu l-fond numru 35 mal-fond numru 39, halli jkollhom dar ta` abitazzjoni wahda sabiex isservi l-htigijiet taghhom. Huma ghandhom zewg ulied.

Ir-rikorrent Camilleri kompla jixhed illi meta akkwistaw il-fond numru 39 kienu jafu li kien hemm kirja fis-sehh favur l-intimati Camilleri. Pero` huma ddecidew li ma jibqghux jaccettaw il-hlas tal-kera ghaliex dehrilhom li l-ammont ta` kera li kien qed jithallas mill-intimati Camilleri kien baxx wisq. Qal li huma pprezentaw din il-kawza ghaliex jidhrilhom li mhux sewwa li l-ligi tippermetti li persuna li tkun ghamlet kuntratt ta` cens ghal zmien li jaghlaq tibqa` tabita fil-post meta jaghlaq il-kuntratt u zzomm il-post b`titolu ta` kera. Ighid li dan jikkostitwixxi ksur tal-jeddijiet fondamentali taghhom bhala sidien. Kompla jghid illi ghalkemm huma jehtiegu l-fond ghall-bzonnijiet taghhom, effettivament m`ghandhomx rimedju ghajr ghal din il-kawza.

Stqarr illi huma qeghdin jippretendu l-hlas ta` kumpens b`effett mill-1 ta` Mejju 1998 u cioe` d-data meta ghalaq ic-cens temporanju.

Fil-**kontroezami** kkonferma li huma s-sidien tal-fondi numru 32, 33, 34, 35 u 39 fi Triq il-Creche Sliema. Ghandhom ukoll appartamenti ohra li jinsabu Windsor Street, Sliema.

Xehed illi ghall-fond in kwistjoni huwa hallas prezz ta` €68,000. Akkwistaw b`dak il-prezz wara li saret stima minn perit. Stqarr illi wara li kien akkwistat il-fond de quo huma pprezentaw applikazzjoni ghall-hrug ta` permess tal-izvilupp ghal blokk ta` appartamenti.

Mitlub ifisser x`danni kien garrab b`effett minn data tal-akkwist tal-fond, ir-rikorrent ma gharafx iwiegeb. Lanqas ma kien edott mill-fatt li wara li kien akkwistat il-fond, il-ligi kienet inbidel b`mod u manjiera li seta` jintalab zieda fil-kera.

Min-naha tal-intimati Camilleri, jirrizulta li huma bdew ighixu fil-fond in kwistjoni ftit jiem wara li sar il-kuntratt ta` cens temporanju. Waqt li kien ghaddej ic-cens, inbidlet il-ligi. Konsegwenza ta` dan il-bdil, meta ghalaq ic-cens temporanju, it-titolu taghhom sar kera billi l-fond kien ir-residenza ordinarja taghhom, apparti li t-tnejn huma cittadini Maltin.

Mhux kontestat illi l-intimati Camilleri huma pensonjanti u dejjem hallsu c-cens u l-kera kif kienu obbligati. Illum qeghdin jaghmlu depoziti taht l-awtorita` tal-qorti billi r-rikorrenti ma accettawx il-hlas tal-kera.

L-intimat Camilleri xehed li ghall-ahhar ta` Gunju tal-2017 saru jafu li kien hareg permess ta` l-izvilupp sabiex il-fond numru 39 isir blokk ta` flats. Dan il-fatt gie ghall-gharfien taghhom meta minghajr ebda preavviz sabu avviz imwahhal mal-post taghhom.

Saru jafu wkoll illi r-rikorrenti akkwistaw il-fond de quo ghall-prezz ta` €68,000. Cio` nonostante r-rikorrent ippropona li jbiegh lilhom il-

fond de quo proprjeta`ghall-prezz ta` €350,000. Huma rrifjutaw ghaliex ma setghux ilahhqu ma` dik l-offerta.

Kien accertat bhala fatt li ghajr ghall-fond de quo l-intimati Camilleri m`ghandhomx kenn jew saqaf iehor fuq rashom.

**Daqstant ghall-fatti li hargu <u>direttament</u> mix-xiehda ta` r-rikorrent Gerald Camilleri u ta` l-intimat Alphonse Camilleri.**

**Prova ohra dwar fatti kienet kostitwita kemm bir-relazzjoni tal-perit tekniku Perit Mario Cassar kif ukoll mill-eskussjoni tieghu.**

Mir-relazzjoni tal-perit tekniku, jinsorgu dawn il-fatti :-

1. Illi l-fond in kwistjoni huwa mezzanin li jinsab kantuniera bejn Triq Creche u Triq Windsor, Sliema. Ghandu l-arja sovrastanti.

2. Illi l-mezzanin ghandu daqs ta` 105 mk.

3. Illi wara li qies l-ghamla tal-post, id-daqs, l-istat attwali, kif ukoll il-fatt li l-fond kien fi stat liberu u frank, il-perit tekniku wasal ghall-konkluzjoni illi l-fond ghandu valur fis-suq ta` €283,500.

4. Illi ghar-rigward tal-valur lokatizju tal-fond, kien stabbilit illi fl-1998 kien jammonta ghal €3337 fis-sena waqt illi fl-2018 dan kien tela` ghal €9922.50 fis-sena.

Fl-istadju tal-eskussjoni, il-perit tekniku xehed kif wasal ghall-figuri li ndika fir-relazzjoni. Wara li qies *property comparables* ikkonkluda li l-valur lokatizju kellu jkun ta` minimu ta` 3.5% tal-valur tal-propjeta`. Stqarr illi skont il-*Property Price Index* tal-Bank Centrali ta` Malta,

jirrizulta illi fil-kaz ta` *maisonettes*, l-indici tas-sena 2000 kien jindika li llum mezzanin sar jiswa 2.99 darbiet aktar minn dak li kien jiswa bejn l-1998 u l-2000. Dan issarraf f`awment ta` 5.6% fis-sena liema percentagg ivarja minn lokalita` ghal ohra.

Kompla jghid illi l-valur tal-post kien meqjus fi stat *furnished* bl-ghamara tigi valutata €4,000. Xehed illi ha in konsiderazzjoni l-fatt illi l-post kien qed jinzamm fi stat tajjeb ta` manutensjoni, u li s-soqfa ma kienx jidher li kellhom xi hsarat partikolari. Qal illi l-mezzanin kien jinsab f`Zona ta` Konservazzjoni Urbana. Fl-istima tal-valur lokatizju, ma kkunsidrax il-valur potenzjali tal-izvilupp tal-arja. Skont in-*North Harbour Local Plan* ippubblikat mill-MEPA u DC 2015, l-gholi ta` zvilupp permess fiz-zona fejn jinsab il-mezzanin huwa ta` 11.4 m ghal 15.4 m. Tenut kont tal-valur ta` proprjetajiet ohra fl-inhawi, li qeghdin jinbieghu bil-prezz ta` €3141 ghal kull metru kwadru, huwa adotta rata ta` €2700 ghal kull metru kwadru sabiex wasal ghall-valur lokatizju tal-mezzanin. Qal ukoll illi kirjiet fuq bazi ta` *long let* fiz-zona qeghdin igibu bejn €900 u €1200 fix-xahar.

## III. <u>L-ewwel (1) eccezzjoni tal-intimati Camilleri</u>

Fl-ewwel (1) eccezzjoni, l-intimati Camilleri qeghdin jeccepixxu li r-rikorrenti ma ezawrewx ir-rimedji ordinarji disponibbli ghalihom.

L-**<u>Art 46(2) tal-Kostituzzjoni</u>** jipprovdi :-

> *Il-Prim`Awla tal-Qorti Civili ghandu jkollha gurisdizzjoni originali li tisma` u tiddecidi kull talba maghmula minn xi persuna skont is-subartikolu (1) ta` dan l-artikolu, u tista` taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq, jew tizgura t-twettiq ta` kull wahda mid-disposizzjonijiet tal-imsemmija artikoli 33 sa 45 (maghdudin) li ghall-protezzjoni taghhom tkun intitolata dik il-persuna :*
>
> *Izda l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skont dan*

*is-subartikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli favur dik il-persuna skont xi ligi ohra.*

L-istess jirrizulta fl-**<u>Art 4(2) tal-Kap 319</u>**.

Kif inghad minn din il-Qorti diversament preseduta fil-kawza fl-ismijiet **<u>John Grech et vs Onor Prim Ministru et</u>** deciza fid-29 ta`April 2013 (u konfermata mill-Qorti Kostituzzjonali fil-31 ta` Jannar 2014) :-

> *Illi din il-kwistjoni giet dibattuta diversi drabi fil-Qrati taghna. Il-Qorti Kostituzzjonali dahlet fil-fond taghha fis-sentenza taghha fil-kawza fl-ismijiet **<u>"Dr Mario Vella vs Joseph Bannister nomine"</u>** (deciza fis-7 ta` Marzu 1994) fejn, wara li elenkat numru ta` sentenzi precedenti, qalet fost affarijiet ohra illi :*
>
> *"Minn din ir-rassenja kemm tal-Prim` Awla u kemm ta` din il-Qorti jistghu jitnisslu dawn il-linji gurisprudenzjali :*
>
> *a. Meta hu car li hemm mezzi ordinarji disponibbli ghar-rikorrenti biex ikollu rimedju ghad-danni li qed jilmenta, bhala principju generali dawn ghandhom jigu adoperati u r-rikors ghall-organi gudizzjarji ta` natura Kostituzzjonali ghandu jsir wara li l-ordinarji jigu ezawriti jew meta mhumiex disponibbli;*
>
> *b. Din il-Qorti Kostituzzjonali sakemm ma jirrizultawlhiex ragunijiet serji gravi ta` llegalita` jew ta` gustizzja jew zball manifest ma tiddisturbax l-ezercizzju ta` diskrezzjonalita` tal-ewwel Qorti kkonferita mill-artikolu 46 (2) tal-Kostituzzjoni;*
>
> *c. Kull kaz ghandu l-fattispecje partikolari tieghu;*
>
> *d. Meta r-rikorrenti ma jkunx ghamel uzu minn rimedju li seta` kellu dan ma jfissirx li l-Qorti ghandha tikkonsidra li ma ghandhiex tezercita l-gurisdizzjoni taghha jekk dak il-*

*possibbli rimedju ma kienx pero` jirrimedja hlief in parti l-lanjanzi tar-rikorrenti;*

*e. Meta r-rikorrenti ma jkunx ezawrixxa r-rimedju ordinarji, jekk pero` dan in-nuqqas ikun ikkontribwixxa ghalih l-operat ta` haddiehor allura ma jkunx desiderabbli illi l-Qorti tieqaf u ma tipprocedix bit-trattazzjoni tal-kaz;*

*f. Meta l-ewwel Qorti tezercita d-diskrezzjoni taghha u tieqaf mit-trattazzjoni minghajr ma tezamina l-materja necessarja li fuqha dik id-diskrezzjoni ghandha tigi ezercitata, il-Qorti tat-tieni grad ghandha twarrab dik id-diskrezzjoni."*

*Illi l-istess Qorti fil-kawza fl-ismijiet "**<u>Philip Spiteri vs Sammy Meilaq</u>**" (deciza fit-8 ta` Marzu 1995) qalet ukoll li:*

*"Meta l-oggett tal-kawza jkun ta` natura komplessa – u jkollu kwistjonijiet li ghandhom rimedju f` xi ligi ohra, u ohrajn li ma ghandhomx, rimedju hlief Kostituzzjonali – allura ghandha tipprevali din l-ahhar azzjoni". F`din is-sentenza l-Qorti osservat li jkun sewwa li mal-kelma `komplessa` jizdied il-kliem `jew inkella mhallta`.*

*Fil-kawza fl-ismijiet "**<u>Maria sive Marthese Attard et vs Policy Manager tal-Malta Shipyards et</u>**" (deciza mill-Prim` Awla, Sede Kostituzzjonali, fit-30 ta` Settembru 2010) gie dikjarat illi :*

*"L-ezistenza ta` rimedju iehor trid titqies fil-kuntest tal-allegat ksur tad-dritt fundamentali. Ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza dan il-ksur. Fl-istess waqt ma hemmx ghalfejn li biex jitqies effettiv ikun jirrizulta li r-rimedju sejjer jaghti lir-rikorrenti success garanti. Huwa bizzejjed li jintwera li jkun wiehed li jista` jigi segwit b`mod prattiku, effettiv u effikaci.*

*Meta jidher li jezistu mezzi ordinarji disponibbli biex jikseb rimedju ghall-ilment tieghu r-rikorrent ghandu jirrikorri ghal dawk il-mezzi, qabel ma jirrikorri ghar-rimedju Kostituzzjonali u huwa biss wara li jkun fittex dawk il-mezzi*

*jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza r-rimedju Kostituzzjonali."*

*Illi f`dan is-sens wiehed jista` jsib ukoll l-insenjament fir-rigward fis-sentenza tal-Qorti tal-Appell fl-ismijiet "**Joseph Fenech vs Awtorita` tal-Ippjanar et"** deciza fid-9 ta` Novembru 2012*

*…*

*Illi wiehed ghandu jqis li kemm l-artikolu invokat mill-intimati u kemm il-Kostituzzjoni ta` Malta ssemmi mezzi li `kienu disponibbli` u allura anke jekk kien hemm mezzi li `kienu` disponibbli ghar-rikorrent izda li minhabba t-trapass taz-zmien ma jkunux ghadhom (disponibbli), il-Qorti tista` jekk hekk jidhrilha tiddeklina li tezercita l-gurisdizzjoni taghha.*

Fid-decizjoni li tat fis-27 ta` Frar 2006 fil-kawza **Sonia Zammit et vs Ministru tal-Politika Socjali et** din il-Qorti diversament presjeduta rreferiet ghal aktar gurisprudenza :-

*"Meta huwa car li hemm mezzi ordinarji disponibbli ghar-rikorrent biex ikollu rimedju ghad-dannu li qed jillamenta, bhala principju generali dawn ghandhom jigu adoperati, u r-rikors ghall-organi gudizzjarji ta` natura kostituzzjonali ghandu jsir wara li l-ordinarji jigu ezawriti jew meta ma humhiex disponibbli." (**Dr Mario Vella vs Joseph Bannister noe** – Qorti Kostituzzjonali deciza 7 ta` Marzu 1994).*

*"Hu veru li kull persuna tista` tirrikorri lill-Prim Awla ghal rimedju ta` indole Kostituzzjonali, imma l-ewwel subinciz ta` dak l-Artikolu 46 irid jigi moqri mal-proviso tat-tieni subinciz tieghu li jipprovdi li l-Qorti tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha skond dak l-artikolu f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat `huma jew kienu disponibbli favur dik il-persuna skond xi ligi ohra.`" (**Lawrence Cuschieri vs Onor Prim Ministru** – Qorti Kostituzzjonali deciza 6 t`April 1995)*

*"Sakemm tibqa` l-possibilita` li l-lezjoni tad-dritt fundamentali setghet kienet jew ghad tista` tigi rettifikata bil-proceduri u mezzi provduti bil-ligi, ikun generalment il-kaz li l-Qorti tiddeklina milli tezercita s-setghat kostituzzjonali taghha."* (***Stephen Falzon vs Registratur tal-Qorti et*** *– Qorti Civili Prim Awla (Sede Kostitizzjonali) deciza 14 ta` Frar 2002).*

*"Il-Prim Awla tal-Qorti Civili ghandha poteri diskrezzjonali wiesgha biex tiddeciedi li ma tezercitax il-poteri taghha meta r-rikorrent ma ezawriex ir-rimedji possibbli taht il-ligi ordinarja."* (***Domenico Savio Spiteri vs Chairman Planning Authority et"*** *– Qorti Kostituzzjonali deciza 31 ta` Mejju 2000).*

Abbazi ta` dawn il-parametri li johorgu mill-gurisprudenza, din il-Qorti trid tqis jekk skont il-fatti tal-kaz tal-lum : (i) ir-rikorrenti kellhomx ghad-dispozizzjoni taghhom rimedji ordinarji li kienu accessibbli, xierqa, effettivi u effikaci sabiex jindirizzaw il-lanjanzi taghhom ; u (ii) jekk ir-rimedju ordinarju kienx ikopri ghal kollox il-lanjanzi tar-rikorrenti. Fi kwalunkwe kaz, tibqa` d-diskrezzjoni ta` din il-Qorti li taghzel "*li tezercita s-setghat taghha*" anke meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju.

Fil-kaz tal-lum, jirrizulta ppruvat bhala fatt illi r-rikorrenti ma hadux passi ohra, ghajr ghall-procediment tal-lum. Pero` dan il-fatt m`ghandux ikun ostakolu jew pregudizzjali sabiex tipprocedi l-azzjoni odjerna.

L-ghan ewlieni ta` procediment ta` natura kostituzzjonali u/jew konvenzjonali huwa li l-persuna illi tkun qed iggarrab ksur tal-jeddijiet fondamentali taghha tinghata rimedju effettiv u minghajr dewmien. Hija gurisprudenza stabbilita illi, anke jekk procediment kostituzzjonali huwa ntiz biex ikun straordinarju, cittadin li jilmenta minn ksur tal-jeddijiet fondamentali tieghu m`ghandux ikun obbligat ifittex rimedju ordinarju, jekk ir-rimedju li jista` jinghata ma jkunx effettiv sabiex jindirizza l-ilment tieghu.

Fis-sentenza li tat fis-27 ta` Marzu 2015 fil-kawza fl-ismijiet **Ian Peter Ellis et vs Avukat Generali et** il-Qorti Kostituzzjonali ghamlet din l-osservazzjoni :-

> *Dwar il-materja ta` awment fil-kera u n-nuqqas tal-applikanti li jirrikorru quddiem il-Bord li Jirregola l-Kera, il-Qorti Ewropeja fil-kawza **Ghigo v. Malta** [Appl. 31122/05 para.66] osservat :*
>
> *"It is true that the Government reproached the applicant for his failure to institute proceedings before the Rent Regulation Board to fix a fair rent for the premises.... However it has not been shown by any concrete examples from domestic law and practice that this remedy would have been an effective one."*

Bhala fatt jirrizulta illi r-rikorrenti qatt ma talbu zieda fil-kera. Lanqas hadu azzjoni ghal dak il-ghan. Infatti fl-ittra ufficjali tal-10 ta` Awwissu 2017, ir-rikorrenti interpellaw lill-intimati sabiex jizgombraw mill-fond *de quo* u jaghtu lura c-cwievet fuq il-pretest illi l-kirja ta` l-fond kienet tilledi d-drittijiet fondamentali taghhom. Fl-istess waqt, tajjeb jinghad illi l-**Art 5(3)(a) tal-Kap 158** jipprekludi awment fil-kera jew bdil fil-kondizzjonijiet tal-kirja jekk mhux bil-permess tal-Bord li Jirregola l-Kera (`**il-Bord**`). Barra minn hekk l-**Art 5(3)(b) tal-Kap 158** jesigi li jkunu sodisfatti numru ta` kondizzjonijiet stringenti qabel ma l-Bord ikun jista` jqis ir-ripreza tal-fond mis-sid u jordna l-izgumbrament tal-inkwilin. Isegwi ghalhekk illi peress illi l-kirja tal-intimati Camilleri hija regolata bil-Kap 158, ir-rikorrenti ma jistghu jaghmlu xejn biex itejbu l-pozizzjoni taghhom billi jirrikorru ghal-ligi ordinarja. Anke li kieku talbu awment fil-kera quddiem il-Bord, jibqa` l-fatt illi l-ammont illi l-Bord seta` jiffissa skont il-ligi huwa baxx b`mod sproporzjonat meta titqies il-kera li fond bhal dak in kwistjoni jgib fis-suq hieles. Ma hemm l-ebda paragun bejn il-valur tal-proprjeta` lura fl-1914 u dak tal-lum.

Il-Qorti tosserva wkoll li l-emendi ghall-Kap 16 li saru bl-Att X tal-2009 ma jistghux jitqiesu bhala li jaghtu rimedju effettiv ghal-lanjanzi tar-rikorrenti ghaliex anke b`dawk l-emendi jirrizulta sproporzjon kontra r-rikorrenti bejn l-awment fil-kera skont l-Art 1531C tal-Kap 16 u l-valur

lokatizju tal-fond fis-suq hieles. Tajjeb jinghad illi fl-impostazzjoni tal-kawza, kif saret mir-rikorrenti, it-talbiet ghall-ghoti ta` rimedju effettiv jitilqu mill-pretensjoni li huma garrbu ksur tal-jeddijiet fondamentali taghhom. Anke jekk il-Bord ghandu s-setgha illi jqis talba ghal awment fil-kera, m`ghandux is-setgha illi jistharreg ksur ta` jeddijiet fondamentali. Dikjarazzjoni dwar lezjoni ta` drittijiet fondamentali tista` tinghata biss minn din il-Qorti.

Kif osservat din il-Qorti diversament presjeduta fis-sentenza li tat fit-30 ta` Jannar 2018 fil-kawza fl-ismijiet **Sergio Falzon et vs Avukat Generali et** :-

> "*Illi konsegwenza tal-istess, l-imsemmi disposizzjonijiet li huma applikabbli mill-Bord li Jirregola l-Kera jikkostitwixxu in effett ostakolu legali ghar-rikorrenti biex jirriprendu l-pussess tal-proprjeta` taghhom stante li l-intimati Farrugia ssodisfaw ir-rekwiziti tac-cittadinanza u tar-residenza ordinarja fuq indikati kif ukoll il-kondizzjonijiet tal-kirja. Certament f`tali kuntest il-Bord wiesgha kemm hi wiesgha il-kompetenza tieghu, mhuwiex fakoltizzat bil-Ligi li jizgumbra inkwilin li qed jonora l-obbligazzjonijiet tal-kirja - materja li hija ghal kollox irrilevanti ghall-ezercizzju tallum.*
>
> *Illi huwa ovvju li it-talbiet odjerni, fis-sustanza taghhom, imorru oltre konsiderazzjoni ta` allegat ksur tal-obbligi tal-kerrej. Anzi l-intimati inkwilini ghamlu enfasi fuq l-osservazzjoni rigida taghhom tal-kondizzjonijiet tal-kirja.*
>
> *Inoltre r-rikorrenti qed jitolbu kumpens ghall-ksur tad-drittijiet fondamentali li, kif gie ribadit mill-Qorti Ewropea f`Strasbourg:*
>
> *[t]o date the Court has always held that constitutional redress proceedings are effective in respect of complaints under Article 1 of Protocol No. 1, in so far as it has always been considered that there are no limits on the means of redress (including financial redress) which may be provided by the courts of constitutional jurisdiction." (Apap Bologna v. Malta, ECHR 46931/12 deciza 30 ta` Awwissu 2016)."*

Din il-Qorti tishaq illi "*l-indoli tal-azzjoni tigi dezunta mhux tant mill-kliem piu` o meno ezatti ta` l-att istituttiv tal-gudizzju, imma mill-iskop li ghaliha huwa intiz il-gudizzju* [**Kollez. Vol.XXXIV.III.746**]." Fil-kaz tal-lum, din il-Qorti tghid illi l-azzjoni kif impostata mir-rikorrenti tista` biss tigi deciza minn qorti bhal din ta` gurisdizzjoni kostituzzjonali u/jew konvenzjonali, u ma tistax tkun trattata minn qorti jew tribunal ta` gurisdizzjoni ordinarja.

**Ghalhekk, filwaqt illi tiddikjara li sejra tezercita s-setghat taghha kif previst bl-Art 46(2) tal-Kostituzzjoni u bl-Art 4(2) tal-Kap 319, qeghda tichad l-ewwel (1) eccezzjoni tal-intimati Camilleri.**

## IV. L-eccezzjoni nru. tnejn (2) tal-intimat Avukat Generali

Il-gurisprudenza kostanti tal-qrati taghna hija fis-sens illi fil-kawzi ta` indole kostituzzjonali mhuwiex indispensabbli illi r-rikorrent jipprova t-titolu tieghu ghall-proprjeta` ghaliex kawzi bhal din tal-lum mhumiex kawzi ta` rivendika fejn il-prova tat-titolu hija *sine qua non* sabiex tirnexxi l-azzjoni.

Fis-sentenza li tat fis-7 ta` Frar 2017 fil-kawza **Robert Galea vs Avukat Generali et** din il-Qorti diversament presjeduta qalet hekk :-

> *"Illi biex wiehed ikun f`qaghda li juri li garrab ksur tal-jedd fundamentali tieghu taht l-artikolu 37 tal-Kostituzzjoni m`ghandux ghalfejn jipprova titolu assolut u lanqas wiehed originali bhallikieku l-azzjoni dwar ksur ta` jedd fundamentali kienet wahda ta` rivendika (Kost. 27.3.2015 fil-kawza fl-ismijiet **Ian Peter Ellis et vs Avukat Generali et**). Huwa bizzejjed, ghall-finijiet ta` dak l-artikolu, li wiehed juri li ghandu jedd fil-haga li tkun li bih jista` jieqaf ghall-pretensjonijiet ta` haddiehor.*

*Imbaghad, ghall-finijiet tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, huwa bizzejjed li l-persuna turi li kellha l-pussess tal-haga li tkun."*

Dan premess, il-Qorti tosserva illi r-rikorrenti **fil-fatt** ghamlu l-prova tat-titolu.

Infatti jirrizulta ppruvat illi :-

a) Permezz ta` kuntratt ta` enfitwesi temporanja tal-24 ta` Marzu 1977, l-intimati konjugi Camilleri akkwistaw minghand Carmel u Doris konjugi Bezzina, b`titolu ta` subenfitwesi temporanja, id-dar bl-isem "Detroit", numru 39, Creche Street, Sliema, ghal zmien wiehed u ghoxrin (21) sena soggett ghall-hlas ta` subcens annwu ta` sittin Lira Maltija (Lm 60) pagabbli kull tlett xhur bil-quddiem dekorribbli mill-1 ta` April 1977.

b) Permezz ta` kuntratt ta` bejgh tat-13 ta` Mejju 2017, fl-atti tan-Nutar Dr Rachel Busuttil, ir-rikorrenti xtraw u akkwistaw minghand Louis Mallia, Paul Mallia, Josephine Bonello u Carmen Bonello, ilkoll ahwa Mallia il-mezzanin li jinsab fl-ewwel sular, bl-arja tieghu, ufficjalment enumerat 39, bl-isem `Detroit`, fi Creche Street, Tas-Sliema.

**Iz-zewg atti kienu prezentati mir-rikorrenti mar-rikors promotur. Cio` nonostante l-Avukat Generali xorta nsista fuq il-prova tat-titolu fl-eccezzjoni tieghu ; ghaliex dan il-komportament jibqa` nspjegabbli anke tenut kont tal-fatt illi fil-kors tal-kawza, il-prova tat-titolu li gabu r-rikorrenti ma kenitx kontestata.**

Il-Qorti tqis illi r-rikorrenti ghandhom titolu validu ghall-post u ghalhekk ghandhom dritt jippretendu li jgawdu l-jeddijiet taghhom fuqu u li jitlobu l-harsien ta` dawk id-drittijiet.

**L-eccezzjoni numru tnejn (2) tal-intimat Avukat Generali qeghda tkun respinta.**

## V. <u>L-ewwel (1) talba u l-eccezzjonijiet numru tnejn (2) u tlettax (13) tal-intimati Camilleri</u>

**<u>Fl-ewwel domanda</u>**, ir-rikorrenti qeghdin jitolbu dikjarazzjoni mill-qorti li l-Artikolu 12, 12A u 12B tal-Kap 158 bil-fatt illi jaghtu lill-inkwilini dritt ta` rilokazzjoni qeghdin jaghmluha difficli ghas-sidien illi jiehdu lura l-pussess tal-proprjeta` taghhom.

Fit-tieni eccezzjoni, l-intimati Camilleri jeccepixxu illi l-kwistjoni tal-izgumbrament u tat-tmiem tal-kirja hija materja li tezorbita l-kompetenza ta` din il-Qorti kif adita.

Qabel tghaddi ghall-konsiderazzjoni ta` din it-tieni eccezzjoni, peress li hija marbuta ma` dak li r-rikorrenti qeghdin jittentaw jiksbu bl-ewwel domanda, il-Qorti tirrimarka mill-ewwel li bhala rimedju, ir-rikorrenti mhux qeghdin jitolbu l-izgumbrament tal-intimati Camilleri mill-fond de quo, ghalkemm fl-ittra ufficjali taghhom tal-10 ta` Awwissu 2017 huma kienu nterpellaw lill-intimati Camilleri sabiex jizgombraw mill-fond de quo.

Dan premess, il-Qorti tosserva li l-intimati Camilleri hadu l-fond b`titolu ta` subcens ghal perjodu ta` 21 sena b`effett mill-24 ta` Marzu 1977. Ghalhekk il-koncessjoni kellha tigi fl-gheluq kontrattwali taghha fl-1998. Gara li bis-sahha tal-**<u>Art 12(2) u (3) tal-Kap 158</u>**, li kienu ntrodotti bl-Att XXIII tal-1979, u li gew fis-sehh b`effett mill-15 ta` Gunju 1979, inghata lil dak li kien censwalist il-jedd li jaqleb it-titolu tieghu ghal kera dment illi jkun cittadin Malti u l-fond ikun ir-residenza ordinarja tieghu.

**<u>L-Art 12(2) u (3) tal-Kap 158</u>** jaqraw hekk :

*(2) Meta dar ta` abitazzjoni tkun inghatat b`enfitewsi temporanja -*

*(a) ghal perijodu ta` mhux izjed minn tletin sena, jekk il-kuntratt ikun sar qabel il-21 ta` Gunju, 1979, jew*

*(b) ghal kull perijodu iehor, jekk il-kuntratt ikun sar wara l-imsemija data,*

*u fit-tmiem xi enfitewsi bhal dik l-enfitewta jkun cittadin ta` Malta u jkun jokkupa d-dar bhala residenza ordinarja tieghu l-enfitewta jkollu jedd li jibqa` jokkupa id-dar b`kera minghand il-padrun dirett –*

*(i) b`kera li jkun daqs ic-cens li kien jithallas minnufih qabel ma tkun ghalqet l-enfitewsi, mizjud, fil-bidu tal-kirja tad-dar bis-sahha ta` dan l-artikolu, u wara t-tmiem ta` kull hmistax-il sena wara sakemm tibqa` l-kirja favur l-istess kerrej, b`daqstant mic-cens li kien jithallas minnufih qabel dak il-bidu jew il-bidu ta` kull perijodu sussegwenti ta` hmistax-il sena, li jkun ammont li ma jkunx izjed minn dak ic-cens, li jirrapprezenta bi proporzjon ghal dak ic-cens iz-zieda fl-inflazzjoni minn meta c-cens li ghandu jizdied ikun gie stabbilit l-ahhar ; u*

*(ia) suggett ghall-kondizzjonijiet stabbiliti fis-subartikolu 5(3)(b); u*

*(ii) taht dawk il-kondizzjonijiet l-ohra li jistghu jigu miftehma bejniethom jew, jekk ma jkunx hemm ftehim, skont kif il-Bord jidhirlu xieraq.*

*(3) Meta fit-tmiem ta` enfitewsi kif imsemmi fis-subartikolu (2)(a) jew (b) d-dar ta` abitazzjoni tkun suggetta ghal kirja, id-disposizzjonijiet tal-Ordinanza li tirregola t-Tigdid tal-Kiri ta` Bini, m`ghandhomx japplikaw dwar kirja bhal dik :*

*Izda meta l-kerrej taht l-imsemmija kirja jkun cittadin ta` Malta u jkun jokkupa d-dar bhala r-residenza ordinarja tieghu dan ghandu, fit-tmiem tal-imsemmija kirja, ikollu il-jedd li jkompli jokkupa d-dar taht kirja gdida minghand il-*

*padrun dirett bl-istess kera u taht l-istess kondizzjonijiet kif imsemmija fis-subartikolu (2)(i) u (ii) dwar l-enfitewta.*

Jirrizulta li l-antekawza tar-rikorrenti accettaw il-konverzjoni fit-titolu tant illi hadu u baqghu jircievu l-hlas tal-kera. Kien biss wara l-2017, meta r-rikorrenti akkwistaw il-fond li l-kera bdiet tigi rifjutata, tant li l-intimati Camilleri bdew jiddepozitaw il-kera l-qorti. Ghalkemm meta akkwistaw, ir-rikorrenti kienu jafu li fil-post kien hemm inkwilin, kienu pronti li jirrigettaw il-kirja tant li b`ittra ufficjali tal-10 ta` Awissu 2017 interpellaw lill-intimati Camilleri sabiex jizgombraw mill-fond. Min-naha taghhom, l-intimati baqghu fermi fil-pozizzjoni taghhom.

Tajjeb jinghad li ghalkemm ir-rikorrenti kienu jafu li fil-post kien hemm inkwilin, huma bhala sidien kellhom idejhom marbuta dwar dak illi seta` jsir mill-proprjeta` li kienu akkwistaw. Fil-fatt anke l-antekawza tar-rikorrenti kellhom idejhom marbuta, ghad illi mal-intimati Camilleri kienu kontrattwalment marbuta b`subcens temporanju limitat ghal zmien ta` 21 sena. L-ghazla ta` dawn kienet illi jaccettaw il-legislazzjoni l-gdida li saret u li dahlet fis-sehh meta kien ghaddej il-kuntratt ta` subcens temporanju. Sidien ohra fi zminijiet aktar ricenti ghamlu ghazliet ohra billi marru ghall-proceduri kostituzzjonali u/jew konvenzjonali. B`daqshekk pero` ma jfissirx li l-antekawza tar-rikorrenti rrinunzjaw ghal xi jeddijiet kostituzzjonali u/jew konvenzjonali li kellhom jew rabtu lis-successuri taghhom fit-titolu bl-ghazla li kienu ghamlu.

Fis-sentenza li tat fid-29 ta` April 2016 fil-kawza fl-ismijiet **Maria Ludgarda sive Mary Borg vs Rosario Mifsud et** il-Qorti Kostituzzjonali qalet illi :

*"kien biss fl-ahhar snin illi ghall-ewwel darba gie dikjarat li l-Artikolu 12(2) jilledi d-dritt fundamentali protett taht l-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea (sentenza tal-Qorti Ewropea filkaz Amato Gauci vs Malta, 15 ta` Dicembru 2009). ….Dan m`huwiex kaz ta` ksur ta` dritt fundamentali li jsehh ta` darba, izda vjolazzjoni kontinwata tal-Artikolu 1 tal-Ewwel Protokoll. Fic-cirkostanzi dan l-argument hu nfondat. Issir ukoll riferenza ghas-sentenza tal-Qorti Ewropea fil-kaz Anthony Aquilina v Malta*

*Applikazzjoni 3851/12) tal-11 ta` Dicembru 2014, li kienet titratta wkoll kaz ta` controlled rent. Minkejja li s-sid kien baqa` jircievi l-kera l-qorti xorta ddikjarat ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, ghalkemm ikkunsidrat dan `il fatt meta llikwidat id-danni."*

(ara wkoll : **Rose Borg vs Avukat Generali et** : deciza mill-Qorti Kostituzzjonali fil-11 ta` Lulju 2016 ; **Rebecca Hyzler et vs Avukat Generali et** : deciza minn din il-Qorti diversament presjeduta fid-9 ta` Mejju 2018)

**Ghandhom ragun ir-rikorrenti jilmentaw illi d-disposizzjonijiet mill-Kap 158 citati fl-ewwel talba fil-fatt jaghtu dritt ta` rilokazzjoni lill-intimati. Pero` m`ghandhomx ragun ir-rikorrenti meta fl-ewwel talba jilmentaw illi r-ripreza tal-pussess tal-proprjeta` hija "impossibbli".**

Il-Qorti taghmel riferenza ghas-sentenza li tat il-Qorti tal-Appell fl-24 ta` April 2015 fil-kawza : **Michael Angelo Briffa et vs Nadia Merten** : fejn inghad hekk :-

*16. Lanqas ma huwa relevanti l-fatt illi r-rimedju moghti mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ta` Amato Gauci kien il-kundanna tal-gvern li jhallas id-danni u mhux il-kundanna tal-kerrej ghal zgumbrament. Qabel xejn kawzi quddiem il-Qorti Ewropea jsiru kontra l-istat u mhux kontra cittadini privati: il-kerrej, li ma kienx parti fil-kawza, ma setax jigi kundannat li jizgombra. Barra minn hekk, ir-rimedju li tista` taghti dik il-qorti huwa biss kontra l-istat: ma ghandha ebda setgha tordna zgumbrament ta` cittadini privati. Ukoll, dik il-qorti tista` biss tghid illi irravvizat ksur ta` xi disposizzjoni tal-Konvenzjoni ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali izda ma ghandha ebda setgha li tghid illi l-ligi domestika "tkun bla effett".*

Fis-sentenza taghha tal-11 ta` Ottubru 2011 fil-kawza : **<u>Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et</u>** : din il-Qorti diversament presjeduta qalet hekk :-

> *" … fost ir-rimedji li qieghda titolob l-attrici ghal dan il-ksur hemm dak tal-izgumbrament tal-konvenuti Bajada mill-fond. Din il-qorti ma tarax illi huwa kompitu taghha fil-kompetenza kostituzzjonali li taghti ordni ta` zgumbrament, ukoll ghax ma giex, u ma setax jigi, dibattut quddiemha jekk il-konvenuti Bajada ghandhomx xi titolu iehor biex izommu l-fond. Jidher ukoll illi hemm kawza ohra pendenti bejn l-attrici u l-kerrejja (rikors mahluf numru 288/2007) fejn tigi dibattuta l-kwistjoni tal-izgumbrament. Ghall-ghanijiet ta` din il-kawza tal-lum huwa bizzejjed li jinghad illi l-konvenuti Bajada ma jistghux jinqdew bl-art. 12A tal-Kap. 158 biex jilqghu ghal kull azzjoni li ghamlet jew tista` taghmel l-attrici fil-forum kompetenti biex tikseb l-izgumbrament taghhom."*

Fis-sentenza taghha tas-7 ta` Dicembru 2012 fl-istess kawza, il-Qorti Kostituzzjonali kkonfermat din il-posizzjoni billi qalet hekk :-

> *"Dwar x`ghandu jkun ir-rimedju, l-Ewwel Qorti pprovdiet billi qalet illi l-intimati Bajada ma jkunux jistghu jinqdew bl-Artikolu 12A tal-Kap. 158 biex jilqghu ghal kull azzjoni li tista` taghmel ir-rikorrenti fil-forum kompetenti biex tikseb l-izgumbrament taghhom. Din il-Qorti, wara li hasbet fit-tul fuq din il-materja, tara li dan mhux rimedju li tista` taghti.*
>
> *Il-bilanc bejn l-interessi differenti jrid joholqu l-Gvern, u hu l-Gvern li jrid ibati l-konsegwenzi jekk jonqos minn dan id-dmir tieghu. Ghan-nuqqas tal-Gvern ma ghandux ibati ccittadin. La darba, f`dan il-kaz, il-ligi per se ma gietx meqjusa li tikser il-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem, ma tistax tigi dizapplikata ghall-kaz. Din il-Qorti gia` osservat f`kuntest iehor li meta jkun hemm ordni ta` rekwizizzjoni u l-Gvern iqieghed persuna ohra in situ b`kera li titqies baxxa, ir-rimedju mhux li tithassar dik l-ordni ta` rekwizizzjoni izda li jinghata kumpens adegwat bhala just satisfaction u dan talli ma nholoqx bilanc gust bejn l-*

*interessi involuti. F`dawn ic-cirkostanzi, ma tkunx l-ordni ta` rekwizizzjoni nnifisha li tkun kisret id-dritt ta` proprjeta` tas-sid, izda l-mekkanizmu ta` kumpens (ara Montanaro Gauci v. Direttur Akkomodazzjoni Socjali et, deciza minn din il-Qorti fil-25 ta` Novembru 2011). Anke l-kaz meritu ta` din il-kawza m`huwiex il-passi li ha l-Gvern fl-interess generali li huma hziena izda l-mekkanizmu li holoq biex jigi determinat l-applikazzjoni tal-ligi u l-quantum tal-kumpens. Ghalhekk, anke f`dan il-kaz, ir-rimedju ghandu jkun ta` kumpens, kif del resto jipprovdi l-Artikolu 41 ta` Konvenzjoni Ewropeja, l-uniku ligi li nstab li gie miksur.*

*Din il-Qorti ma tistax taghti ordni li twassal, wisq probabbli, ghat-tkeccija tal-konjugi Bajada mill-fond inkwistjoni, meta l-protezzjoni infisha, moghtija lilhom mill-Gvern, mhux leziva ghad-drittijiet tas-sid. Veru li jista jinghad li, f`dan il-kaz, il-konjugi Bajada ma haqqhomx jibqghu fil-post la darba ghandhom proprjeta` immobbli ohra, pero`, ghal dan ma hasibx il-Legislatur, u ma jahtux il-konjugi Bajada li jippruvaw jiehdu vantagg mil-ligi kif inhi.*

*Kif osservat il-Qorti Ewropeja tal-Gustizzja fil-kaz ta` Amato Gauci, aktar qabel imsemmi, meta l-ligi ma tipprovdix li s-sid ikun jista` jikkontesta d-dritt tal-enfitewta li juzufriwixxi ruhu bil-beneficcji li taghtih il-ligi "on the basis that they were not deserving of such protection, as they owned alternative accomodation", ir-rizultat ikun li "the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of the tenants and those of the owners". Kwindi, il-ligi ghandha titqies applikabbli ghall-kaz, izda peress li fl-istess ligi jezistu nuqqasijiet procedurali biex jinholoq bilanc gust, irid jinghata kumpens adegwat lis-sid halli "jinholoq" dan il-bilanc."*

Fis-sentenza tal-25 ta` Ottubru 2013 li tat il-Qorti Kostituzzjonali fil-kawza : **Dr. Cedric Mifsud et vs. L-Avukat Generali et** : inghad hekk :-

*13. It-tieni aggravju jolqot ir-rimedju li tat l-ewwel qorti meta qalet illi l-konvenuti Azzopardi ma jistghux jinqdew bl-art. 12(2) biex izommu l-proprjetà tal-atturi b`kiri. …*

*14. Huwa minnu illi l-Avukat Generali bhala rapprezentant tal-gvern ghandu interess generali fit-twettiq tal-politika ta` social housing. Madankollu, ghall-ghanijiet ta` proceduri gudizzjarji interess generali bhal dak jista` ma jkunx bizejjed jekk il-parti interessata ma tkunx se tiehu vantagg fil-kaz partikolari.*

*15. Fil-kaz tal-lum il-konvenuti Azzopardi ma appellawx mis-sentenza li ghalhekk, ghalihom, hija res iudicata. L-istess konvenuti Azzopardi ghalhekk huma marbuta bid-decizjoni tal-ewwel qorti illi "ma jistghux jinvokaw dan il-provvediment [tal-art. 12(2) tal-Kap. 158] biex jibqghu jabitaw fil-fond oggett ta` dawn il-proceduri". Huwa ovvju ghalhekk illi, ghall-ghanijiet tal-kawza tallum, l-Avukat Generali ma jista` jikseb ebda vantagg minn dan l-aggravju.*

*16. Ghal din ir-raguni l-qorti ma tqisx aktar dan l-aggravju.*

Fis-sentenza : **<u>Robert Galea vs Avukat Generali et</u>** : op cit : din il-Qorti diversament presjeduta rrilevat :-

*"Illi ghal dak li jirrigwarda r-rimedju l-iehor mitlub mir-rikorrent, il-Qorti taghraf li saret talba specifika fir-rikors promotur innifsu biex hija tikkunsidra l-izgumbrament tal-intimati Ganado mill-post;*

*Illi l-Qorti tifhem li kulma jmur, ir-rikorrent fil-qaghda attwali qieghed igarrab ksur tal-jedd tieghu dwar hwejgu. Kif sewwa jghid, jekk il-Qorti kellha tieqaf biss bl-ghoti ta` kumpens, ma tkunx qieghda teqred l-ghajn tal-vjolazzjoni li qieghed igarrab u kull kumpens f`kull kaz ikun rimedju parzjali li jieqaf malli tinqata` l-kawza billi l-Qorti ma tistax f`kawza bhal din taghti kumpens ghall-gejjieni li mhux maghruf kemm jista` jtul (Ara Amato Gauci vs Malta §80);*

*Illi, min-naha l-ohra, sejbien ta` ksur ta` jedd fundamentali jitlob l-ghoti ta` rimedju effettiv, kemm fil-prattika u kif ukoll fil-ligi, b`mod li l-ghoti wahdu ta` kumpens jista` ma jitqiesx bhala rimedju tajjeb bizzejjed. F`kazijiet ta` dawn l-ahhar zmien, il-Qorti fi Strasbourg qieset li r-rimedju tat-tnehhija tal-okkupant minn post kien ir-rimedju effettiv li messu nghata, u li ghat-tbatija li ggarrab il-parti mnehhija jrid jaghmel tajjeb l-Istat Malti (Ara Q.E.D.B. 30.8.2016 fil-kawza fl-ismijiet Apap Bologna vs Malta (Applik. Nru. 46931/12) §§ 76 sa 91 (kaz li jirrigwarda Ordni ta` Rekwizizzjoni);*

*Illi f`dan ir-rigward u wara li hasbet fit-tul, il-Qorti taghzel li taghmel taghha l-principji imwettqa mill-Qorti Kostituzzjonali f`cirkostanza bhal din (Ara Kost. 31.1.2014 fil-kawza fl-ismijiet Dr. Cedric Mifsud et vs L-Avukat Generali et §§ 32 – 36) u tghid li l-intimati Ganado ma jistghux jibqghu jinqdew bid-dispozizzjonijiet tal-artikolu 12 tal-kapitolu 158 tal-Ligijiet ta` Malta ladarba b`dak il-mod ir-rikorrent ikun qieghed igarrab ksur tal-jedd tieghu taht l-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni. Min-naha l-ohra, huwa wkoll stabbilit li mhuwiex il-kompitu ta` Qorti mitluba tistharreg ilment ta` ksur ta` jedd fundamentali dwar it-tgawdija bil-kwiet tal-gid u l-ghoti ta` kumpens xieraq biex tordna t-tnehhija mill-post tal-okkupant li jkun. F`kaz bhal dak, ir-rimedju jrid jitfittex quddiem it-tribunal xieraq li lilu l-ligi taghti l-kompetenza specjali biex iqis kwestjonijiet bhal dawn. Dan jinghad ukoll minkejja li din il-Qorti tgawdi setghat wesghin ta` rimedju li tista` taghti f`kaz li ssib ksur ta` xi jedd fundamentali tal-parti attrici;*

*Illi, kif inghad aktar qabel, ladarba fil-kaz tallum hemm kirja li ghadha fis-sehh fiz-zmien "konvenzjonali" taghha, il-kwestjoni tat-tnehhija mill-post tal-intimati Ganado tkun tfisser li b`dak il-kuntratt u minghajru, il-jeddijiet pattwiti taghhom ikunu ngabu fix-xejn. Jixraq li l-kwestjoni tas-siwi u z-zamma fis-sehh ta` dak il-kuntratt jitqiesu ghalhekk mit-tribunal xieraq f`azzjoni apposta;*

*Illi ghalhekk, ghall-finijiet tal-istess tieni talba tar-rikorrenti, il-Qorti sejra tordna li l-intimati Ganado ma jistghux jistriehu*

*izjed fuq id-dispozizzjonijiet tal-artikolu 12 tal-kapitolu 158 tal-Ligijiet ta` Malta biex jiggustifikaw iz-zamma taghhom tal-post tar-rikorrent."*

(ara wkoll : **Cassar Torreggiani vs Avukat Generali et** : QK : 29 ta` April 2016 ; u **Victor Portanier et vs Avukat Generali et** : QK : 29 ta` April 2016 - fost ohrajn).

Fid-decizjoni tat-22 ta` Frar 2012 moghtija mill-ECtHR fil-kaz ta` **Frendo Randon and Others v. Malta** inghad illi :-

> *16. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see Iatridis v. Greece (just satisfaction) [GC}, no. 31107/96 §32, ECHR 2000- XI, and Guiso-Gallissay v. Italy Just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows of restitutio in integrum it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If; however, national law does not allow - or allows only partial reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."*

Tghodd ukoll il-konkluzjoni li waslet ghaliha l-ECtHR fil-kaz ta` **Lindheim and Others vs Norway** tat-12 ta` Gunju 2012 :-

*"Whilst in reaching the above conclusion the Court has focused on the particular circumstances of the applicants` individual complaints, it adds by way of a general observation that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislation itself and that its findings extend beyond the sole interests of the applicants in the instant case. This is a case where the Court considers that the respondent State should take appropriate legislative and/or other general measures to secure in its domestic legal order a mechanism which will ensure a fair balance between the interests of lessors on the one hand, and the general interests of the community on the other hand, in accordance with the principles of protection of property rights under the Convention."*

**Din il-Qorti tirribadixxi illi procediment kostituzzjonali u/jew konvenzjonali mhuwiex u m`ghandux ikun is-sede fejn jigi deciz jekk inkwilin ghandux ikun zgumbrat minn fond inkella le bhala rimedju ghal vjolazzjoni ta` jedd fondamentali tutelat mill-Kostituzzjoni u/jew mill-Konvenzjoni. Fil-kuntest tal-procediment tal-lum, din il-Qorti tghid illi fil-kaz li tkun sabet vjolazzjoni, ir-rimedji ghandhom ikunu ohrajn, izda mhux l-izgumbrament tal-inkwilini.**

**Ghalhekk il-Qorti qeghda tilqa` l-eccezzjonijiet numru tnejn (2) u tlettax (13) tal-intimati Camilleri.**

Ferm il-premess, il-Qorti tosserva illi fl-10 ta` Lulju 2018, u allura qabel ma saret din il-kawza, dahal fis-sehh l-Att XXVII tal-2018 li bih kien emendat il-Kap 158. Qabel dan l-Att, l-izgumbrament ta` inkwilin fis-sitwazzjonijiet li jahseb ghalihom il-Kap 158 kien determinat b`dak li jghid l-Art 5(3)(b) tal-Kap 158 li jaqra hekk :

*"Sid il-kera jista` biss jirrifjuta li jgedded il-kirja, u jista` biss jiehu lura l-pussess tad-dar, meta tintemm il-kirja, jekk juri ghas-sodisfazzjon tal-Bord, b`rikors biex jiehu lura l-pussess, li matul iz-zmien tal-kirja, il-kerrej kien naqas li jhallas il-kera dovut minnu ghal zewg skadenzi jew*

*iktar fi zmien hmistax-il gurnata minn dak in-nhar li sid il-kera jkun talbu biex ihallas, jew ghax ikun ghamel hafna hsara fid-dar, jew ghax xort`ohra jkun naqas milli jhares il-kondizzjonijiet tal-kirja jew l-obbligi tieghu tahtha, jew ghax ikun uza l-fond xort`ohra milli principalment bhala r-residenza ordinarja tieghu."*

Il-Qorti kkunsidrat l-Att XXVII tal-2018. L-emendi ghall-Kap 158 dahlu fis-sehh fl-1 ta` Awissu 2018. Kien introdott l-Art 12B, li jaghti lis-sid il-jedd li jmur quddiem il-Bord, u jitlob revizjoni tal-kera sa ammont li ma jkunx jeccedi t-2% tal-valur liberu u frank fis-suq miftuh ta` fond ta` abitazzjoni. Id-disposizzjoni tahseb ukoll sabiex fil-bidu ta` kull procediment b`talba ghal awment fil-kera isir test tal-mezzi tal-inkwilin. Tahseb imbaghad ghal x`jigri jekk l-inkwilin ma jkunx jissodisfa t-test tal-mezzi.

L-**<u>Art 12(4) tal-Kap 158</u>** ighid :

*"Meta l-kerrej ma jissodisfax il-kriterji tad-dhul u tal-kapital tat-test tal-mezzi, il-Bord ghandu, wara li jkun sema` kwalunkwe evidenza u sottomissjonijiet imressqa mill-partijiet, jaghti decizjoni li tippermetti lill-kerrej zmien ta` hames snin sabiex il-fond jigi vakat. Il-kumpens pagabbli lill-proprjetarju ghall-okkupazzjoni tal-fond matul l-imsemmi perjodu ghandu jammonta ghad-doppju tal-kirja li kienet tkun pagabbli skont l-artikoli 5, 12 jew 12A."*

Il-hsieb ghal dawn l-emendi jidher illi kien sabiex sid ta` fond li jaqa` taht dak li jiddisponi l-Art 12 tal-Kap 158 jkollu l-jedd li jibda proceduri sabiex jitlob awment fil-kera, b`dan illi jekk jirrizulta bhala difficli ferm, jekk mhux kwazi mpossibbli, ghall-inkwilin illi jhallas l-awment, allura dan kellu jinghata zmien sabiex jivvaka l-abitazzjoni.

Tajjeb jinghad ukoll illi bl-emendi li dahlu fis-sehh bl-Att XXVII tal-2018 il-legislatur haseb sabiex jirregola talbiet ta` sid ta` fond ghall-izgumbrament ta` okkupanti tal-fond tas-sid.

**L-Art 12B(11) tal-Kap 158** ighid :

*"Id-dispozizzjonijiet ta` dan l-artikolu ghandhom ukoll japplikaw fil-kazijiet kollha fejn kwalunkwe enfitewsi, subenfitewsi jew kirja fir-rigward ta` dar ta` abitazzjoni regolata taht l-artikoli 5, 12 jew 12A tkun skadiet minhabba decizjoni tal-qorti msejsa fuq in-nuqqas ta` proporzjonalità bejn il-valur tal-proprjetà u l-ammont li ghalih huwa ntitolat sid il-kera u l-persuna li kienet l-enfitewta, is-subenfitewta jew il-kerrej ghadha tokkupa d-dar bhala r-residenza ordinarja taghha fl-10 ta` April 2018. F`dawn il-kazijiet is-sid ma jistax jipprocedi biex jitlob l-izgumbrament tal-okkupant minghajr ma jaghmel uzu minn qabel tad-dispozizzjonijiet ta` dan l-artikolu."*

**L-Art 12B(11) tal-Kap 158** jahseb sabiex is-sid jitlob direttament l-izgumbrament tal-inkwilin.

Il-legislatur ittenta johloq bilanc bejn l-interessi tas-sidien u dawk tal-inkwilini. Ghalhekk filwaqt li kien protett id-dritt tal-inkwilin ghar-rilokazzjoni, dak id-dritt ma kienx jibqa` jissussisti aktar fil-kaz li l-inkwilin ma jkunx f`qaghda illi jhallas awment fil-kera.

Fis-sentenza li tat din il-Qorti diversament presjeduta fis-17 ta` Ottubru 2018 fil-kawza fl-ismijiet **Victoria Amato Gauci et vs Avukat Generali et** (li minnha sar appell, liema appell ghadu mhux deciz) inghad hekk dwar l-applikazzjoni tal-Artikolu 12B tal-Kap 158 :

*"Illi l-Qorti tqis li din l-ahhar bidla fil-ligi tolqot fil-laham il-haj il-qaghda li jinsabu fiha r-rikorrenti fil-kaz tallum u lil dawk kollha f`qaghda bhalha. Mhuwiex ghal din il-Qorti li taghmel il-kunsiderazzjonijiet taghha f`din is-sentenza dwar is-siwi ta` dak l-artikolu bhala rimedju definittiv tal-kwestjoni. Madankollu, tqis li dik il-bidla fil-ligi tohloq ghamla ta` "jus superveniens" favur ir-rikorrenti f`din il-kawza, fis-sens li qeghda taghtihom rimedji li jistghu jinqdew bihom biex isewwu jew inehhu l-ksur tal-jedd fundamentali imgarrab minnhom. Tqis ukoll li dawn id-*

*dispozizzjonijiet tal-ligi jaghtu jedd ta` azzjoni quddiem tribunal imparzjali li jista` jaghti rimedju effettiv u accessibbli, kif sewwasew jitlob l-artikolu 13 tal-Konvenzjoni. Tajjeb li jinghad li biex rimedju moghti jitqies `effettiv` ghall-finijiet tal-artikolu 13, ma huwiex mehtieg li jiggarantixxi tabilfors ezitu favorevoli ghall-persuna li tista` tinqeda bih u lanqas li dak ir-rimedju tabilfors jinghata minn awtorita` gudizzjarja, sakemm tali rimedju huwa wiehed accessibbli u fih elementi ragonevoli li jista` jirnexxi*".

Il-Qorti tikkondividi din il-linja ta` hsieb.

**Il-Qorti sejra tilqa` l-ewwel talba <u>limitatament</u> fis-sens illi qeghda tiddikjara u tiddeciedi li l-Art 12, 12A u 12B qeghdin jaghtu lok ghal tigdid tal-kirja *ope legis*.**

## VI. <u>It-tieni (2) talba</u>

Ir-rikorrenti jikkontendu illi t-tigdid *ope legis* tal-kirja jikkostitwixxi vjolazzjoni kemm tad-dritt taghhom hekk kif protett bl-Artikolu 37 tal-Kostituzzjoni, kif ukoll tad-dritt hekk kif tutelat bl-Art 1 Prot 1 tal-Konvenzjoni.

### 1. <u>L-Art 37 tal-Kostituzzjoni u l-Art 1 Prot 1 tal-Konvenzjoni</u>

Diversi kienu l-okkazjonijiet fejn il-qrati taghna ttrattaw fid-dettall il-kwistjoni ta` jekk limitazzjoni fit-tgawdija ta` proprjeta` tistax tigi ekwiparata ma` tehid forzuz kif kontemplat bl-Art 37 tal-Kostituzzjoni.

Ghalkemm fil-kaz tal-lum, ir-rikorrenti jilmentaw minn ksur ta` din id-disposizzjoni tal-Kostituzzjoni, din il-Qorti hija tal-fehma konsiderata illi d-disposizzjonijiet mertu ta` din il-kawza ma jwasslux ghal tehid forzuz tal-propjeta` izda ghal kontroll fl-uzu taghha.

(ara s-sentenzi : QK - **Josephine Bugeja vs Avukat Generali et** – 7 ta` Dicembru 2009 ; QK - **Angela sive Gina Balzan v. L-Onorevoli Prim Ministru et** – 7 ta` Dicembru 2012 ; PA/K - **Rose Borg vs Avukat Generali et** - 25 ta` Frar 2016 ; QK - : **Mary Anne Busuttil vs Tabib John Cassar et** – 31 ta` Ottubru 2014 ; QAS - **Michael Angelo Briffa et v. Nadia Merten** – 24 ta` April 2015 ; PA/K - **Robert Galea vs Avukat Generali et -** 7 ta` Frar 2017 ; PA/K – Catherine Cauchi et vs Avukat Generali et - 2 ta` Mejju 2017 ; PA/K - **Anthony Aquilina vs Avukat Generali** - 9 ta` Ottubru 2017)

Ghalkemm xi drabi jistghu jinqalghu sitwazzjonijiet fejn skont xi disposizzjonijiet tal-Kap 158 il-konverzjoni *ope legis* tkun tammonta ghal forma ohra ta` tehid forzuz mhuwiex dan il-kaz tal-lum ghaliex ir-rikorrenti dejjem baqghu sidien tal-proprjeta` taghhom u effett tal-bidliet legislattivi l-propjeta` baqghet taghhom. Li sehh kien biss kontroll fit-tgawdija u fl-uzu tal-propjeta` tar-rikorrenti. Tishaq fuq dan anke ghaliex il-kaz tal-lum ma kienx wiehed ta` konverzjoni ta` enfitewsi temporanja ghal wahda perpetwa izda kien kaz ta` bdil fit-titolu minn enfitewsi temporanja ghal lokazzjoni.

Daqstant safejn it-tieni talba tirrigwarda l-Art 37 tal-Kostituzzjoni.

L-Avukat Generali jikkontendi li l-mod kif sar il-kontroll tat-tgawdija u tal-uzu tal-fond *de quo* effett tal-Art 12 tal-Kap 158 ma kienx jikser l-Art 1 Prot 1 tal-Konvenzjoni.

L-Art 1 Prot 1 tal-Konvenzjoni jghid :-

*Kull persuna naturali jew persuna morali ghandha d-dritt ghat-tgawdija pacifika tal-possedimenti taghha.*

*Hadd ma ghandu jigi pprivat mill-possedimenti tieghu hlief fl-interess pubbliku u bla hsara tal-kundizzjonijiet provduti bil-ligi u bil-principji generali tal-ligi internazzjonali.*

*Izda d-disposizzjonijiet ta` qabel ma ghandhom b`ebda mod inaqqsu d-dritt ta` Stat li jwettaq dawk il-ligijiet li jidhrulu xierqa biex jikkontrolla l-uzu tal-proprjeta skond l-interess generali jew biex jizgura l-hlas ta` taxxi jew kontribuzzjonijiet ohra jew pieni.*

Id-disposizzjoni hija gwidata minn tliet principji :-

a) Kull persuna, fisika jew morali, ghandha dritt ghat-tgawdija tal-proprjeta` b`mod pacifiku.

b) Kull tnaqqis fit-tgawdija tal-proprjeta` jista` jkun biss gustifikat jekk jintwera li jkun sar fl-interess pubbliku. Ghalhekk id-dritt mhuwiex assolut u huwa soggett ghall-kundizzjonijiet mahsuba fil-ligi. Min jisfa` imcahhad mill-jedd tieghu, ghandu jedd ghal rimedju.

c) Jibqa` mpregudikat id-dritt tal-Istat illi jghaddi ligijiet sabiex *inter alia* b`mod xieraq jikkontrolla l-uzu tal-gid fl-interess pubbliku.

Il-Qorti taghmel referenza ghad-decizjoni li kienet moghtija mill-Grand Chamber tal-ECtHR fil-5 ta` Jannar 2000 fil-kaz **<u>Beyeler vs Italy</u>** fejn inghad hekk :-

*"98. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, `distinct` in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle*

*enunciated in the first rule" (see, among other authorities, the* ***James and Others v. the United Kingdom*** *judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reproduces in part the analysis given by the Court in its* ***Sporrong and Lönnroth v. Sweden*** *judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also the* ***Holy Monasteries v. Greece*** *judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56, and* ***Iatridis v. Greece*** *[GC], no. 31107/96, § 55, ECHR 1999-II)."*

Fil-kaz tal-lum, ma ghandux ikun hemm dubbju li dak li ried jikseb il-legislatur bl-introduzzjoni tal-Art 12(2) tal-Kap 158 kien certament kontroll ta` uzu tal-proprjeta`.

Huwa pacifiku li l-Istat ghandu margini ta` apprezzament wesghin meta jigi biex jintroduci legislazzjoni li tkun intiza sabiex tindirizza problemi fil-qasam tal-akkomodazzjoni ghall-fini residenzjali. Madanakollu kwalsiasi interferenza mill-Istat trid tkun (i) legali (ii) motivata b`ghan legittimu fl-interess generali, u (iii) tohloq bilanc gust. Jehtieg li jinzamm proporzjon ragjonevoli bejn il-mezzi u l-ghan persegwiti mill-Istat sabiex jikkontrolla l-uzu tal-proprjeta`. Ir-*raison d`etre* tal-proporzjonalita` huwa l-"bilanc xieraq" li ghandu jinzamm bejn l-esigenzi tal-interess generali u l-htiega tal-harsien tad-drittijiet fundamentali tal-persuna. Il-qrati huma msejha sabiex jaghmlu analizi komprensiva tal-interessi tal-partijiet kollha sabiex ikun accertat li konsegwenza tal-indhil tal-Istat il-persuna ma titghabbiex b`piz eccessiv u sproporzjonat.

## 2. Gurisprudenza tal-ECtHR

Fil-kaz ta` **Spadea and Scalabino vs Italy** deciz fit-28 ta` Settembru 1995 kien osservat :-

*"The second paragraph reserves to States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest.*

*…*

*Such laws are especially common in the field of housing, which in our modern societies, is a central concern of social and economic policies.*

*…*

*In order to implement such policies, the legislature must have a wide margin of appreciation.*

*…*

*The Court will respect the legislature`s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.*

*…*

*an interference must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights.*

*…*

*There must be a reasonable relationship of proportionality between the means employed and the aim pursued."*

Ghalkemm huwa rikonoxxjut u accettat id-dritt tal-Istat li jikkontrolla l-uzu tal-proprjeta`, l-Istat, fl-ezercizzju ta` dan il-jedd, ghandu jhares u jwettaq il-principju tal-proporzjonalita`, ghaliex l-interess tal-privat ghandu jkun imhares u garantit.

Fil-kaz ta` **Amato Gauci vs Malta** li kien deciz fil-15 ta` Settembru 2009, l-ECtHR qalet :-

*"56. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands*

*of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **Sporrong and Lönnroth** cited above, §§ 69-74, and **Brumărescu v. Romania** [GC], no. 28342/95, § 78, ECHR 1999-VII).*

*57. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State`s interference the person concerned had to bear a disproportionate and excessive burden (see **James and Others**, cited above, § 50; **Mellacher and Others**, cited above, § 48, and **Spadea and Scalabrino v. Italy**, judgment of 28 September 1995, § 33, Series A no. 315-B).*

*58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (see **Immobiliare Saffi v. Italy**, [GC], no. 22774/93, § 54, ECHR 1999-V; and Broniowski, cited above, § 151).*

*59. Moreover, in situations where the operation of the rent-control legislation involves wide-reaching consequences for numerous individuals and has economic and social consequences for the country as a whole, the authorities must have considerable discretion not only in choosing the form and decidingon the extent of control over the use of property but also in deciding on the appropriate timing for the enforcement of the relevant laws. Nevertheless, that discretion, however considerable, is not unlimited and its exercise cannot entail consequences at variance with the Convention standards (see, mutatis mutandis,* ***__Hutten-Czapska__****, cited above, § 223)."*

*…*

*"In the present case, having regard to the low rental value which could be fixed by the Rent Regulation Board, the applicant`s state of uncertainty as towhether he would ever recover his property, which has already been subject to this regime for nine years, the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades, the Court finds that a disproportionate and excessive burden was imposed on the applicant. The latter was requested to bear most of the social and financial costs of supplying housing accommodation to Mr and Mrs P. (see, mutatis mutandis,* ***__Hutten-Czapska__****, cited above, § 225). It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property.".*

Il-konkluzjoni tal-Qorti kienet illi kien hemm vjolazzjoni ta` Art 1 Prot 1 tal-Konvenzjoni.

Relevanti wkoll huwa dak li nghad mill-ECtHR fid-decizjoni tat-22 ta` Novembru 2011 fil-kaz ta`**__Saliba et vs Malta__** :-

*" … the rise in the standard of living in Malta over these decades and the diminished need to secure social housing compared to the post-war era........it is clear that what might have been justified years ago, will not necessarily be justified today (see **Amato Gauci**, cited above, 60)."*

Fil-kaz ta` **Zammit & Attard Cassar vs Malta** li kien deciz fit-30 ta` Lulju 2015, l-ECtHR irriaffermat il-principji li kienu hargu mis-sentenzi ta` qabel u rriteniet :

*"57. In each case involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State`s interference, the person concerned had to bear a disproportionate and excessive burden (see 9 App.No.1046/12) -EctHR 25 ta` Frar 2016. **James and Others**, cited above, § 50, and **Amato Gauci**, cited above, § 57).*

*58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable.*

*Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State`s conduct (see **Immobiliare Saffi v. Italy**, [GC], no. 22774/93, § 54, ECHR 1999-V, and Broniowski, cited above, § 151)."*

Ta` rilevanza huwa dak li qalet l-ECtRH fil-kaz **Cassar vs Malta** li kien deciz fit-30 ta` Jannar 2018 :-

> *43. The Court reiterates that in order for an interference to be compatible with Article 1 of Protocol No. 1 it must be lawful, be in the general interest and be proportionate, that is to say it must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights (see, among many other authorities,* ***Beyeler v. Italy*** *[GC], no. 33202/96, § 107, ECHR 2000-I, and* ***J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*** *[GC], no. 44302/02, § 75, ECHR 2007-III). The Court will examine these requirements in turn.*
>
> *(a) Whether there was an interference*
>
> *44. In connection with the development of property, the Court has previously found that having been aware of the fact that their property had been encumbered with restrictions when they had bought it (for example, its designation in a local development plan), the applicants could not hold that circumstance against the authorities (see* ***Lacz v. Poland****, (dec.) no. 22665/02, 23 June, 2009; and the case-law cited therein), specially when a complaint has not been made that they had a legitimate reason to believe that the restrictions encumbering their property would be removed after they bought the property. However, the Court has not excluded that there might be particular cases where an applicant who bought a property in full knowledge that it was encumbered with restrictions may subsequently complain of an interference with his or her property rights, for example, where the said restrictions are alleged to be unlawful (ibid.).*
>
> *45. More specifically in the context of restrictions on lease agreements (in particular the prohibition on bringing a tenant`s lease to an end), the Court has found that there was an interference as a result of the domestic courts` refusals of the applicants` demands, despite the applicants`*

*knowledge of the applicable restrictions when they had entered into the lease agreement, a matter which however carried decisive weight in the assessment of the proportionality of the measure (see **Almeida Ferreira and Melo Ferreira v. Portugal**, no. 41696/07, §§ 27 and 34, 21 December 2010).*

*46. Subsequently, in **R & L, s.r.o. and Others** (cited above) the Court specifically examined whether Article 1 of Protocol No. 1 protected applicants who had purchased property in the knowledge that rent restrictions imposed on the property might contravene the Convention. In that case, when the applicants had acquired their respective properties their rents had been set in accordance with the rent regulations applicable at the time and the applicants could not have increased the rents above the threshold set by the State. Nor were they free to terminate the rent agreements and conclude new ones with different – higher – levels of rent. The Court did not find it decisive that one of the applicants had purchased the property before the domestic courts had taken issue with the legislation in place which had given a legitimate expectation that the status of such properties would be addressed by the national legislator in due course. The Court held that it could not be said that the applicants as landlords had implicitly waived their right to set the level of rents, as, for the Court, waiving a right necessarily presupposed that it would have been possible to exercise it. There was no waiver of a right in a situation where the person concerned had never had the option of exercising that right and thus could not waive it. It followed that the rent-control regulations had constituted an interference with the landlords` right to use their property (ibid., § 106).*

*47. In the more recent **Zammit and Attard Cassar** (cited above, § 50) case, in a situation where the applicants` predecessor in title had knowingly entered into a rent agreement in 1971 with relevant restrictions (specifically the inability to increase rent or to terminate the lease), the Court held that, at the time, the applicants` predecessor in title could not reasonably have had a clear idea of the*

*extent of inflation in property prices in the decades to follow. Moreover, the Court observed that when the applicants had inherited the property in question they had been unable to do anything more than attempt to use the available remedies, which had been to no avail in their circumstances. The decisions of the domestic courts regarding their request had thus constituted interference in their respect. Furthermore, as in **R & L, s.r.o. and Others**, in **Zammit and Attard Cassar** (both cited above) the applicants, who had inherited a property that had already been subject to a lease, had not had the possibility to set the rent themselves (or to freely terminate the agreement). It followed that they could not be said to have waived any rights in that respect. Accordingly, the Court found that the rent-control regulations and their application in that case had constituted an interference with the applicants` right (as landlords) to use their property (**Zammit and Attard Cassar**, cited above, § 51).*

*48. Turning to the present case, the Court also notes that the applicants had bought their property before the European Court of Human Rights took issue with the Maltese legislation applicable in cases such as **Amato Gauci** (cited above). That judgment was eventually followed in most cases in domestic case-law. However, again the Court finds this not to be decisive given the passage of time between the purchase of the property and now. In this connection the Court reiterates that what might be justified at a specific time might not be justified decades later (see **Amato Gauci**, cited above, § 60). In the present case, while it is true that the applicants knowingly entered into the rent agreement in 1988 with the relevant restrictions (specifically the inability to increase the rent or to terminate the lease), the Court considers that the applicants could not reasonably have foreseen the extent of inflation in property prices in the decades that followed (see **Zammit and Attard Cassar**, cited above, § 50). Once the discrepancy in the rent applied and that on the market became evident, they were unable to do anything more than attempt to use the available remedies, which they did in 2010, but which were to no avail in their circumstances. The decisions of the*

*domestic courts regarding their application thus constituted interference in their respect. Furthermore, the applicants, who bought a property that was already subject to a restricted lease, did not have the possibility to set the rent themselves or to freely terminate the agreement. Clearly, they could not be said to have waived any rights in that connection (see **Zammit and Attard Cassar**, cited above, § 50).*

*49. Accordingly, the Court finds that the rent-control regulations and their application in the present case constituted an interference with the applicants` right (as landlords) to use their property (see **Zammit and Attard Cassar**, cited above, § 51). Nevertheless, in circumstances such as those of the present case a number of considerations need to be made in connection with the proportionality of the interference.*

*50. The Court has previously held that rent-control schemes and restrictions on an applicant`s right to terminate a tenant`s lease constitute control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. It follows that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 (see **Hutten-Czapska v. Poland** [GC], no. 35014/97, §§ 160-61, ECHR 2006-VIII; **Bittó and Others v.Slovakia**, no. 30255/09, § 101, 28 January 2014; and **R & L, s.r.o. and Others**, cited above, § 108).*

*(b) Whether the Maltese authorities observed the principle of lawfulness and pursued a "legitimate aim in the general interest"*

*51. The Court refers to its general principles on the matter as set out in Amato Gauci (cited above, § 53-54).*

*52. That the interference was lawful has not been disputed by the parties. The Court finds that the restriction arising from the 1979 amendments was imposed by Act XXIII of 1979 and was therefore "lawful" within the meaning of Article 1 of Protocol No. 1.*

*53. In the present case the Court can accept that the applicable legislation in the present case pursued a legitimate social-policy aim, specifically the social protection of tenants (see **Amato Gauci**, cited above, § 55, and Anthony Aquilina, cited above, § 57). It is, however, also true that the relevance of that general interest may have decreased over time, particularly after 2008 (see Anthony Aquilina, cited above, § 57), even more so given that following that date, the only person benefiting from the impugned measures was P.G., whose financial situation as shown before the domestic courts and which is not being contested before this Court, leaves little doubt as to P.G`s necessity for such a property, and at a regulated rent. This Court will therefore revert to this matter in its assessment as to the proportionality of the impugned measure.*

*(c) Whether the Maltese authorities struck a fair balance*

*54. The Court refers to its general principles on the matter as set out in Amato Gauci (cited above, § 56-59).*

*55. The Court will consider the impact that the application of the 1979 Act had on the applicants` property. It notes that the applicants could not exercise their right of use in terms of physical possession as the house was occupied by tenants and they could not terminate the lease. Thus, while the applicants remained the owners of the property they were subjected to a forced landlord-tenant relationship for an indefinite period of time.*

*56. Despite any reference to unidentified procedural safeguards by the Government (see paragraph 41 above) the Court has on various occasions found that applicants in such a situation did not have an effective remedy enabling them to evict the tenants either on the basis of their own needs or those of their relatives, or on the basis that the tenants were not deserving of such protection (see **Amato Gauci**, cited above, § 60, and **Anthony Aquilina**, cited above, § 66). Indeed, when their need arose (some years after they had purchased it) and later despite the little need*

*of it by the tenant – who was not in any particular need of housing (at least after 2008) – the applicants were unable to recover the property. Consequently, the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of the tenants and those of the owners (see **Anthony Aquilina**, cited above, § 66, and mutatis mutandis, **Zammit and Attard Cassar**, cited above, § 61). The Court further considers that the possibility of the tenant leaving the premises voluntarily was remote, especially since the tenancy could be inherited – as in fact happened in the present case. It is clear that these circumstances inevitably left the applicants in uncertainty as to whether they would ever be able to recover their property.*

*57. As to the rent payable, the Court is ready to accept that EUR 466 annually was a more or less reasonable amount of rent in 1988 - particularly given that it was an amount of rent which the applicants were aware of and in spite of which they decided to purchase the property with the relevant restrictions. Furthermore, it was an amount of rent which the applicants expected to receive for a number of years, at least until the demise of J.G. and his wife. Moreover, the Court accepts that at the relevant time the measure pursued a legitimate social-policy aim (see paragraph 53 above) which may call for payments of rent at less than the full market value (see **Amato Gauci**, § 77).*

*58. The same cannot be said after the passage of decades, during which the rent had remained the same (as stated by the parties and the domestic courts, the rent is still EUR 466 annually). The Court has previously held that there had been a rise in the standard of living in Malta over the past decades (see **Amato Gauci**, cited above, § 63, and **Anthony Aquilina**, cited above, § 65). Thus, the needs and the general interest which may have existed in 1979 must have decreased over the three decades that ensued (see **Anthony Aquilina**, cited above, § 65). It is noted that as stated by the Government in paragraph 40 above, the minimum wage in 2015 was EUR 720.46 per month, while in 1974 (the date when Malta adopted a national minimum*

*wage) it amounted to the equivalent of less than EUR 100 per month (see **Amato Gauci**, cited above, § 60).*

*59. The Court need not identify the exact year at which the rent payable was no longer reasonable. It observes that cases against Malta concerning the same subject matter, that is to say renewal of leases by operation of law - whose rent had been set on an open market – (see **Amato Gauci, Anthony Aquilina, and Zammit and Attard Cassar**, all cited above), which have invariably lead to findings of a violation of Article 1 of Protocol No. 1, concerned periods after the year 2000. Furthermore, the Government of the respondent State have often argued that Malta suffered a boom in property prices in 2003 (see, for example, **Apap Bologna v. Malta**, no. 46931/12, § 97, 30 August 2016). Lastly, although not determinative, it was only in 2008 that the applicants refused to accept the rent, once P.G. had inherited the property. In the light of the above it suffices for the Court to consider that a rent based on the value of the property as it stood in 1962 with the relevant adjustment which amounted to EUR 466 annually in 1988 and thereafter – was certainly not reasonable for the years following 2000.*

*60. In particular, even if one had to concede that the valuations submitted by the applicants are on the high side, the Court notes that the first-instance domestic court, in 2011, accepted EUR 3,000 per month (that is to say EUR 36,000 per year) as the rental market value of the property (see paragraph 18 above). Thus, the amount of rent received by the applicants, around EUR 39 a month, that is to say EUR 466 per year, for a fourteen-room house in Sliema, a highly sought-after location, is indeed "derisory" as was also found by the first-instance domestic court (see paragraph 18 above). Indeed, that amount of rent contrasts sharply with the market value of the premises in recent years, as accepted by the domestic court or as submitted by the applicant, as it amounted to a little more than 1% of the market value. The Court considers that State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often*

*cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable (see* ***Amato Gauci****, cited above, § 62).*

*61. In the present case, having regard to the low rental payments to which the applicants have been entitled in recent years, the applicants` state of uncertainty as to whether they would ever recover their property, which has already been subject to this regime for nearly three decades, the rise in the standard of living in Malta over the past decades, and the lack of procedural safeguards in the application of the law, which is particularly conspicuous in the present case given the situation of the current tenant as well as the size of the property and the needs of the applicants, the Court finds that a disproportionate and excessive burden was imposed on the applicants. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants` right of property.*

*62. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.*

## 3. Gurisprudenza ta` dawn il-Qrati

Il-Qorti sejra tghaddi ghal analizi ta` whud mis-sentenzi tal-qrati taghna.

### i) Dr. Cedric Mifsud et vs l-Avukat Generali et
**(Rik numru 33/2010 AE)**

**Fl-ewwel istanza, il-kawza kienet deciza fit-18 ta` Settembru 2012. Wara li kien hemm appell, il-kawza kienet deciza mill-Qorti Kostituzzjonali fil-25 ta` Ottubru 2013.**

a) **<u>L-ewwel istanza</u>**

L-Ewwel Qorti sabet illi l-Art 12(2) tal-Kap 158 kien imur kontra l-Art 1 Prot 1 tal-Konvenzjoni.

Kien osservat illi l-Art 12(2) kien baqa` l-istess kif kien meta kien introdott fl-1979.

Kien altru milli evidenti li l-piz finanzjarju kien ghadu mixhut fuq is-sidien privati.

Ghalhekk kien dikjarat illi l-Art 12(2) huwa bla effett fir-rigward tal-proprjeta` mertu tal-kawza, u kien dikjarat li l-inkwilini ma setghux jinvokaw id-disposizzjoni sabiex jibqghu jabitaw fil-fond.

L-Avukat Generali kien ordnat ihallas lir-rikorrenti s-somma ta` €30,000.

Il-Qorti qalet hekk :

*Sitwazzjoni bhal dik tal-kaz odjern diga` giet trattata mill-Qorti Ewropeja fil-kaz* ***<u>Amato Gauci vs Malta</u>*** *(App.Numru 47045/06) deciz fil-15 ta` Settembru 2009, fejn bazikament il-Qorti qalet:-*

*i. Restrizzjoni ghas-sid li jittermina kirja tissarraf f`kontroll tal-uzu tal-proprjeta. Ghalhekk il-kaz ghandu jigi ezaminat taht it-tieni paragrafu tal-Artikolu 1.*

*ii. L-Att XXIII tal-1979 kien legali in kwantu lghan tieghu kien "a legitimate social policy". Il-Qorti osservat:*

*"Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in 6 f`dan*

*il-kaz the `general` or `public` interest. The notion of `public` or `general` interest is necessarily extensive. In particular, spheres such a housing of the population, which modern societies consider a prime social neeed and which plays a central role in the welfare and economic policies of Contracting states, may often call for some form of regulation by the State.”.*

*iii. Irid jigi sodisfatt l-element ta` proporzjonalita; “As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see **Sporrong and Lönnroth** cited above, §§ 69-74, and **Brumărescu v. Romania** [GC], no. 28342/95, § 78,ECHR 1999-VII).” (Ara wkoll **C.M. v Franza** deciza fis-26 ta` Gunju 2011).*

*iv. Il-kera li r-rikorrent kien qieghed jircievi kull sena, mija u ghoxrin lira Maltija (Lm120), gie ddikjarat li hu baxx.*

*L-istess inghad fir-rigward tal-massimu li seta` jircievi skond il-ligi (Lm420). Kera li tikkontrasta sew ma` dik li tithallas fis-suq hieles. Ghalkemm il-Qorti rrikonoxxiet li l-Gvern kien igawdi minn margni ta` apprezzament wiesgha fir-rigward ta` kontroll ta` kera, “Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent allowing only a minimum profit.”. Fil-kaz taghna b`applikazzjoni tal-Artikolu 12(1) is-sid kien ikollu jedd ghall-kera ta` Lm 99 minn meta ghalaq ic-cens fl-1991, u 15 il-sena wara kien ikollu jedd ghal Lm1488 …*

*v. Meqjus il-kera baxxa, l-incertezza jekk is-sid qattx kien ser jirkupra l-proprjeta tieghu, il-possibilta` remota li l-inkwilina jitlaq mill-fond minn jeddu specjalment mehud in konsiderazzjoni li l-kirja setghtet tintiret, nuqqas ta` salvagwardji procedurali fl-applikazzjoni tal-ligi, u z-zieda tal-istandard of living f`Malta matul is-snin, il-Qorti*

*kkonkludiet li piz zejjed gie mqieghed fuq is-sid; "It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant`s right of property.". Il-Qorti osservat li c-cirkostanzi fuq imsemmija "...inevitably left the applicant in uncertainty as to whether he would ever be able to recover his property.". Ghalhekk ikkonkludiet li hemm ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni.*

*vi. Il-Qorti tat kumpens lir-rikorrent wara li osservat li hu " … entitled to compensation in respect of the loss of control, use, and enjoyment of his property from 2000 to date. In assessing the pecuniary damage sustained by the applicant, the Court, has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has further considered the legitimate purpose of the restriction imposed, reiterating that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less reimbursement of the full market value."*

*vii. Il-Qorti osservat ukoll li wara l-emendi ntrodotti fl-1995, l-effetti ta` din il-ligi thassru ghall-kuntratti li saru wara l-1995; "..... a decision which fell within the State`s margin of appreciation, can be deemed reasonably and objectively justified to protect owners from restrictions impinging on their rights."*

*L-emendi li saru fl-1995 wasslu biex ma tinghatax iktar protezzjoni ghal min jaghmel kuntratt ta` enfitewsi fl-1 ta` Gunju 1995 u wara. B`dan il-provvediment, u ohrajn li lliberalizzaw is-suq tal-kirjiet f`Malta, jidher li l-Gvern ta` Malta kien qieghed jirrikonoxxi li l-qaghda socjali tal-pajjiz ma kinetx titlob li tinghata iktar protezzjoni. Madankollu ma saret l-ebda revizjoni ta` dawk li bhal rikorrenti sabu ruhhom imcahhdin mill-proprjeta taghhom bi dritt li jircievu kumpens mizeru. Japplika wkoll f`dan il-kaz il-konkluzjoni li ghamlet il-Qorti Ewropea fil-kaz* ***Lindheim and Others v Norway*** *deciz fit-12 ta` Gunju 2012 :-*

*"Whilst in reaching the above conclusion the Court has focused on the particular circumstances of the applicants` individual complaints, it adds by way of a general observation that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislation itself and that its findings extend beyond the sole interests of the applicants in the instant case. This is a case where the Court considers that the respondent State should take appropriate legislative and/or other general measures to secure in its domestic legal order a mechanism which will ensure a fair balance between the interests of lessors on the one hand, and the general interests of the community on the other hand, in accordance with the principles of protection of property rights under the Convention.".*
*Ovvjament m`huwiex id-dmir tal-Qorti biex tghid kif ghandu jsehh bilanc bejn l-interessi tal-privat u l-interessi l-ohra.*

*Il-Qorti Ewropea diga` kellha l-opportunita li tezamina l-Artikolu 12(2) tal-Kap. 158 fil-kaz ta` Amato Gauci u tesprimi l-fehma taghha. Ghalkemm strettament il-gurisprudenza ta` dik il-Qorti ma torbotx lill-qrati lokali, il-Gvern ma ressaq l-ebda raguni valida ghalfejn din il-Qorti m`ghandix issegwi l-insenjament car li johrog minn dik is-sentenza.*

*Wara li l-Qorti qieset l-istima tal-valur lokatizju paragunat mal-hlas li r-rikorrenti huma intitolati li jircievu skond il-ligi, ic-cirkostanzi l-ohra li semmiet il-Qorti Ewropeja fil-kaz ta` Amato Gauci, u wkoll il-fatt li s-sid ghandu dritt ghall-awment fil-kera kull 15-il sena, zmien li din il-Qorti tqies li ma jirriflettix ir-realta` ekonomika taz-zmenijiet tal-lum, il-konkluzjoni hi li hemm ksur tal-Artikolu 1 tal-Ewwel Protokoll. Il-mizuri li setghu kienu mehtiega matul is-seklu dsatax ma jfissirx li baqghu bzonnjuzi ghaz-zmenijiet tal-lum.*

*…*

*Gialadarba l-Artikolu 12(2) tal-Kap. 158 jipprovdi :-*

*i. Ghall-hlas ta` kera baxxa hafna li ma tirriflettix il-valur tal-proprjeta fuq is-suq. Jekk wiehed kellu joqghod fuq l-istima tal-perit Abela u l-iktar kera li r-rikorrenti huma llum intitolati ghaliha (€465.87 is-sena), ifisser dhul ta` 0.13% tal-valur tal-proprjeta`. Dan il-provvediment ma jissalvagwardjax l-interessi tas-sid, inkluz dak li jaghmlu l-qliegh mill-proprjeta taghhom.*

*ii. Ghall-awment ta` kera kull hmistax-il sena biss.*

*iii. Ghal mod kif jigi kkalkolat awment fil-kera, cioe` bazat biss fuq l-indici ta` inflazzjoni u ma jistax jaqbez id-doppju tal-kera li kien jithallas, minghajr ma wiehed jikkunsidra l-valur tal-proprjeta bhala fattur rilevanti.*

*iv. Ghal fatt li jekk il-partijiet ma jaqblux dwar il-kondizzjonijiet tal-kirja, eskluz dawk li huma regolati mil-ligi, allura l-uniku rimedju li ghandu s-sid hu li jirreferi l-kaz quddiem il-Bord Li Jirregola l-Kera.*

*v. Ghal stat ta` incertezza ghar-rigward ta` meta s-sid ser ikollu dritt jiehu lura l-pussess ta` hwejgu. Ghaddew diga` iktar minn ghoxrin (20) sena minn meta skadiet l-enfitewsi. Incertezza li tezisti minkejja li t-tifsira ta` inkwilina giet ristretta wara l-emendi li saru bl-Att X tal-2009.*

*vi. Ghal nuqqas ta` garanziji procedurali sabiex is-sid ikun jista` jiehu lura l-pussess ta` hwejgu f`kazijiet fejn ikollu bzonn il-proprjeta per ezempju ghall-uzu personali tieghu jew ta` membri tal-familja, jew fejn ic-censwalist ma jimmeritax li jinghata protezzjoni;*

*Il-Qorti ser tiddikjara li dan il-provvediment imur kontra d-dritt fundamentali tar-rikorrenti kif protett fl-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea. Dan hu provvediment li ghadu kif kien meta gie ntrodott fl-1979, u hu altru milli evidenti li l-piz finanzjarju ghadu sal-lum mixhut kollu fuq dawk is-sidien privati li huma milquta minn dan il-provvediment."*

**b)** **<u>It-tieni istanza</u>**

Fid-decizjoni taghha, il-Qorti Kostituzzjonali kkonfermat is-sentenza tal-Ewwel Qorti fil-mertu izda naqqset il-kumpens ghall-vjolazzjoni ghal €15,000.

**ii)** **<u>Angela sive` Gina Balzan vs L-Onorevoli Prim Ministru et Qorti Kostituzzjonali – (op. cit.)</u>**

Fid-decizjoni taghha, il-Qorti Kostituzzjonali qalet hekk :-

*"Ezaminata din il-kwistjoni, din il-Qorti rat li l-posizzjoni li din il-Qorti u l-Qorti Ewropeja tad-Drittijiet Fundamentali tal-Bniedem hadu fil-kuntest tal-emendi fil-ligi tal-kera li dahlu fis-sehh fl-1979, ma kienx li tiddikjara l-emendi antikostituzzjonali, peress li hu fis-setgha tal-Gvern li jikkontrolla l-uzu ta` proprjeta` fl-interess generali, u allura li tipprovdi, per ezempju, ghall-konverzjoni ta` titolu ta` emfitewsi temporanju fuq fond okkupat bhala residenza ghal titolu ta` emfitewsi perpetwa jew titolu ta` kera, jaqa` f`din is-setgha tal-Gvern biex jassigura postijiet bizzejjed ghall-abitazzjoni tan-nies; il-legislazzjoni ut sic ma tistax, allura, titqies li tivvjola d-drittijiet fundamentali ta` sidien dawk il-fondi.*

*L-Istat ghandu f`kazijiet bhal dawn margini wiesgha ta` diskrezzjoni billi hu ghandu taghrif dirett tas-socjeta` u l-bzonnijiet taghha, u ghalhekk bhala principju hu f`posizzjoni ahjar biex jiddetermina x`inhu fl-interess pubbliku u x`mezzi jadopera biex jassigura li kulhadd ikollu ghejxien u akkomodazzjoni xierqa. Fis-sentenza **<u>Ghigo v. Malta</u>**, deciza mill-Qorti Ewropeja tad-Drittijiet Fundamentali tal-Bniedem fis-26 ta` Settembru, 2006, ikkonfermat l-iskop socjali f`legislazzjonijiet li jolqtu materja ta` housing. Hi qalet hekk:*

*"In the present case, the Court can accept the Government`s argument that the requisition and the rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand. These measures, implemented with a view to securing the social protection of tenants were also aimed at preventing homelessness, as well as at protecting the dignity of poorly-off tenants."*

*Il-Gvern irid jara, pero`, li din il-legislazzjoni fl-interess generali tac-cittadin ma tohloqx piz zejjed fuq sid partikolari ghax dan, bhala s-sid tal-proprjeta`, ghandu dritt ghall-kumpens gust ghall-uzu socjali li l-Gvern irid jaghmel mill-proprjeta` tieghu. Hu obbligu tal-Gvern li johloq bilanc gust bejn l-interess tac-cittadin li jkollu fejn jghammar, u l-interess tas-sid li jiehu gwadan gust mill-proprjeta` tieghu. Jekk il-Gvern sejjer hu jimponi residenza go fond, irid johloq mekkanizmu biex jara` li l-interess tas-sid ma jkunx ippregjudikat.*

*Dan hu s-sens tad-decizjoni fil-kaz* ***__Amato Gauci v. Malta__****, deciza mill-Qorti Ewropeja tad-Drittijiet tal-Bniedem fil-15 ta` Settembru, 2009, meta osservat li fejn l-istat johloq sistema ta` "forced landlord – tenant relationship for an indefinate time", irid jigi assigurat li lis-sid jinghata kumpens li mhux "manifestly unreasonable", kumpens li mhux necessarjament ikun daqs dak li joffri s-suq, imma lanqas ma ghandu jwassal li jaghti lis-sid "only a minimal profit".*

*F`dan il-kaz, il-mekkanizmu li holoq il-Gvern iwassal ghall-kumpens li hu ferm `il boghod mill-kumpens li tkun intitolata ghalih ir-rikorrenti kieku thalliet tpoggi l-appartament taghha ghall- kera fis-suq. Kwindi, il-mekkanizmu li holoq il-Gvern, f`dan il-kaz, falla u ma tax rizultat li jirrispekja d-dritt ta` proprjeta` tar-rikorrenti.*

*Hekk kif il-Gvern ghandu dritt jespropria art fl-interess pubbliku, basta joffri kumpens gust ghal dak it-tehid, hekk ukoll jekk, fl-interess nazzjonali, ihoss li jrid jintervjeni fl-uzu li jsir minn proprjeta` ta` terzi, irid jara li c-cittadin privat ma jigix ippregjudikat, u li jinghata kumpens xieraq*

*ghall-uzu impost. L-aspett socjali ta` ligi trid tigi evalwata mill-Gvern, u sta ghall-Gvern jara li ligi, applikabbli ergo omnes, twassal ghal-konsegwenzi mixtieqa, pero`, fejn se jigu aggevolati klassi ta` persuni f`sitwazzjoni partikolari, il-Gvern irid jara Ii ma tbatix klassi ohra ta` cittadin, u hawn il-htiega ta` bilanc gust.*

*Jinkombi fuq il-Gvern li johloq mekkanizmu li f`kull kaz iwassal ghal bilanc gust, u ghall-fini ta` dan il-kaz, din il-Qorti tara li l-Gvern ma provdix ghas-sitwazzjoni fejn il-kumpens ikun baxx wisq, u lanqas ghas-sitwazzjoni fejn l-okkupant, li jrid jipprevalixxi ruhu mil-ligi, ikun hu sid ta` proprjeta` ohra. F`dan il-kaz, it-thaddim tal-mekkanizmu ta` vantagg lill-konjugi Bajada u dan bid-dritt (i) li jibqghu fl-appartament b`mod indefinit; (ii) li jhallsu kera ta` kwazi €500 fis-sena, meta l-valur lokatizzju tal-fond gie stmat mill-perit inkarigat mill-attrici li hu €7,000 fis-sena; u (iii) meta ghandhom proprjeta` ohra zgur fi Triq Ellul Mercer, Sliema (Mezzanin numru 24 u fond numru 17) u fi Triq Villambrosa, Hamrun (terran) maghruf bl-isem "Dar il-Ferh"). Fil-mekkanizmu li holoq il-Gvern ma hemm ebda "safeguard" kontra dawn l-ingustizzji, u jhalli lil sid il-fond ibati l-konsegwenzi ta` dawn ir-rizultanzi.*

*Dan mhux gust, u jwassal lir-rikorrenti ssofri lezjoni fid-dritt taghha ta` proprjeta` kif protett fl-ewwel artikolu tal-ewwel Protokoll tal-Konvenzjoni Ewropeja."*

**iii)** **<u>Maria Ludgarda Borg et vs Rosario Mifsud et</u>**
**(Rik numru 72/14 AE)**

**Fl-ewwel istanza l-kawza kienet deciza fit-30 ta` Ottubru 2015. Wara li sar appell, kien hemm decizjoni mill-Qorti Kostituzzjonali fid-29 ta` April 2016.**

**a)** **<u>L-Ewwel Qorti</u>**

Kien deciz fl-ewwel istanza li minkejja l-emendi bl-Att X tal-2010 fejn il-kera saret rivedibbli kull tliet snin u mhux iktar kull hmistax-il sena, xorta wahda ma kien hemmx bilanc xieraq bejn l-interess generali u dak privat tas-sid.

Inghad :

*"Hu evidenti li f`dan il-kaz il-ligi qeghda tippermetti lir-rikorrenti li tircievi biss a minimal profit (ara sentenza tal-Qorti Ewropea fil-kaz* ***<u>Amato Gauci v. Malta</u>*** *47045/2006 tal-15 ta` Dicembru 2009). Dan m`huwiex bizzejjed biex ikun hemm bilanc xieraq. ….`Il fatt li l-kera hi rivedibbli kull tliet snin m`hijiex mizura li tat lok biex jinholoq il-bilanc xieraq li ssemma hawn fuq. Dan iktar u iktar meta hu fatt maghruf li hu s-suq li jirregola l-kera u mhux l-indici ta` inflazzjoni li hemm fl-Iskeda tal-Kap. 158. Ligi li ghal finijiet ta` kera ma taghti l-ebda konsiderazzjoni per ezempju ghal-lokalita fejn jinsab il-fond, id-daqs tal-fond u l-kundizzjoni tieghu.*

*Apparti l-kera hemm fatturi ohra li juru li ma nzammx il-bilanc xieraq. Hekk per ezempju sid il-kera jista` jirrifjuta li jgedded il-kera biss fil-kazijiet limitati kontemplati fl-Artikolu 5(3) tal-Kap. 158. Tezisti wkoll incertezza meta sid il-kera ser ikun jista` jiehu l-fond taht il-kontroll tieghu. Il-probabilta` hi li fl-istat attwali tal-affarijiet hu remot hafna li l-konjugi Mifsud jitilqu minn jeddhom mid-dar oggett ta` dawn il-proceduri.*

*F`dan ir-rigward hemm stat ta` incertezza totali gialadarba l-ligi ma tiffissax terminu massimu li fih il-proprjeta ghandha tibqa` titgawda b`kirja. Sallum diga` ghaddew sbatax-il sena minn meta tterminat il-koncessjoni enfitewtika, u r-rikorrenti m`ghandha l-ebda hjiel meta ser tiehu lura hwejjigha. Inoltre d-definizzjoni ta` kerrej tinkludi wkoll ulied u hut il-kerrej mhux mizzewwgin li jkunu jghixu mieghu fiz-zmien tal-mewt tieghu (ara Artikolu 2). Fil-kaz in ezami l-konjugi Mifsud ghandhom tifla li tghix maghhom. Claudia Mifsud xehdet li ricentement xtrat appartament gewwa s-Swatar bhala investiment (102).*

*B`daqshekk ma jfissirx li fil-kaz in ezami m`hemmx il-possibilta li tibqa` tghix maghhom u tgawdi mill-protezzjoni li toffri l-ligi. Mela l-ligi ma toffrix biss protezzjoni lill-inkwilin izda wkoll lil terzi. ….*

*Hekk ukoll fis-sentenza* ***Albert Cassar et vs Onor`Prim`Ministru et****, il-Qorti Kostituzzjonali qalet:*

*"[36] Din il-Qorti tosserva li l-Att XXIII tas-sena 1979 li jipprovdi ghall-konverzjoni tac-cens temporanju ghal wiehed ta` lokazzjoni jikkostitwixxi ndhil fid-dritt konvenzjonali tar-rikorrenti ghat-tgawdija tal-proprjeta` taghhom, stante li permezz tieghu nholqot "forced landlord-tenant relationship" ghal zmien indefenit, b`mod li r-rikorrenti qeghdin isofru deprivazzjoni tal-proprjeta` taghhom, stante li ma jistghux juzawha biex jabitaw fiha, kif ukoll qed isofru telf finanzjarju sostanzjali bil-kera baxx fissat mil-ligi".*

*…*

*Hu fatt li mill-provi rrizulta li l-mezzi finanzjarji tal-intimati jiddependu mill-pensjoni li jircievi l-intimat Rosario Mifsud. Ma rrizultax li ghandhom xi ntrojtu iehor. Li tnejn min-nies ighixu bil-pensjoni tar-ragel li jircievi minghand il-Gvern ma tippermettix hajja ta` lussu…. M`hemmx dubju li l-Gvern ghandu dmir li jipprovdi ghal nies fil-bzonn, izda zgur mhux billi jitfa` l-piz kollu fuq sid il-kera. Ir-realta` tal-lum m`hijiex dik li kienet tezisti fl-1979 meta dahal fis-sehh l-Att XXIII li kien l-Att li holoq a forced landlord-tenant relationship. Dan apparti li l-Gvern lanqas ma pprezenta statistika bhala prova li fic-cirkostanzi tal-lum ghad hemm il-htiega tal-mizura li ttiehdet bl-introduzzjoni tal-Att XXIII tal-1979.*

*…*

*Waqt is-smigh tal-kawza ssemma wkoll li :-*

*i. sid il-kera ghandha iktar gid li wirtet minghand il-ġenituri. B`daqshekk ma jbiddel xejn minn dak li diga` ntqal.*

*ii. l-intimati Mifsud ghamlu miljoramenti fil-fond … Pero` hi l-ligi stess li tipprovdi li meta jiskadi t-terminu tal-koncessjoni, il-padrun dirett jiehu lura l-fond bil-miljoramenti (Artikolu 1521 tal-Kodici Civili).*

*15. Gialadarba l-ilment tar-rikorrenti hu gustifikat taht l-Ewwel Artikolu tal-Ewwel Protokoll tal-Konvenzjoni, m`hemmx il-htiega li l-Qorti titratta l-ilment taghhom fir-rigward tal-Artikolu 37 tal-Kostituzzjoni."*

**b) <u>Il-Qorti Kostituzzjonali</u>**

Fis-sentenza taghha, il-Qorti Kostituzzjonali qalet :-

*25. L-ewwel Qorti sabet lezjoni tad-drittijiet tal-intimati taht l-Artikolu 1 tal-Ewwel Protokoll tal-Kap.319…Kemm l-Avukat Generali, kif ukoll l-intimati konjugi Mifsud jissottomettu illi tenut kont tal-interess generali legittimu wara l-mizura legislattiva in dizamina, il-Qorti ma ghandhiex issib sproporzjon tali li jimmerita sejbien ta` lezjoni tal-artikolu protokolari.*

*…*

*28. Fir-rigward hija opportuna l-osservazzjoni maghmula minn din il-Qorti fis-sentenza taghha tad- 29ta` Novembru 2013 fl-ismijiet **<u>Christopher Hall v. Awtorita` tad-Djar et</u>** li :*

*" ... hu l-principju abbraccjat minn din il-Qorti u mill-Qorti Ewropeja li, anke jekk il-mizura li jkun ha l-Istat tkun legittima u tkun fl-interess pubbliku, xorta wahda tista` twassal ghal-lezjoni konvenzjonali jekk ma jinzammx bilanc gust bejn l-interessi tas-socjeta` generali u l-protezzjoni*

*tad-dritt fundamentali sancit fl-Artikolu 1 tal-Ewwel Protokol tal-Konvenzjoni, b`mod li l-mizura, allura legittima, tkun titfa` fuq l-individwu `a disproportionate and excessive burden`."*

*Jigi osservat li, ghad li l-istat ghandu margini wiesgha ta` diskrezzjoni f`materja ta` akkomodazzjoni socjali huwa ghandu l-obbligu li jassigura wkoll li bejn il-mezzi adoperati u l-iskop li jrid jilhaq, ikun hemm bilanc gust bejn il-piz li qed ibati s-sid ta` proprjeta` fit-tgawdija pacifika tad-dritt fundamentali tieghu minhabba kirja protetta, u l-interessi tas-socjeta` in generali. L-istat ghandu ghalhekk l-obbligu illi jassigura li ebda parti ma tkun assoggettata ghal piz sproporzjonat u eccessiv.*

*…*

*32. L-ewwel Qorti sabet li f`dan il-kaz, ghal numru ta` ragunijiet, ma nholoqx bilanc gust bejn l-interess tal-komunita` u l-interessi privati tar-rikorrenti bhala sidien… Din il-Qorti tikkondividi dawn il-konsiderazzjonijiet maghmula mill-ewwel Qorti li wassluha sabiex f`dan il-kaz issib ksur tal-artikolu konvenzjonali fuq citat rizultat ta` fatturi li holqu zbilanc bejn l-ghan tal-mizura u l-piz sproporzjonat u eccessiv li qed isofru r-rikorrenti.*

*…*

*34. Tosserva wkoll li huwiex minnu illi l-Qorti ma qiesitx il-fatt illi uzu ta` proprjeta` fl-interess generali fil-kuntest ta` akkomodazzjoni socjali jista` jimporta riduzzjoni konsiderevoli fl-ammont tal-kera pagabbli.*

*Hija ikkonsidrat l-ammont tal-kera fil-kuntest ta` bilanc xieraq, u waslet ghall-konkluzjoni li l-hlas ta` 18% tal-kera li jimmerita` l-fond in kwistjoni fis-suq hieles, ma huwiex bizzejjed biex jintlahaq dan il-bilanc.*

*Dan id-distakk fil-valur lokatizju johloq sproporzjon u jitfa` piz eccessiv u sproporzjonat fuq ir-rikorrenti bi pregudizzju*

*ghad-dritt fundamentali taghhom sancit bl-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni."*

**iv)** **<u>Robert Galea vs Avukat Generali et (op. cit.)</u>**

Fis-sentenza ta` din il-Qorti diversament presjeduta tas-7 ta` Frar 2017 (**<u>mhux appellata</u>**) inghad hekk :-

*Illi huwa stabbilit li biex indhil fit-tgawdija tal-gid ta` persuna jkun gustifikat fl-interess generali, irid jintwera li hemm utilita` konkreta ghal dak l-indhil, u mhux semplici ipotesi ta` bzonn jew aspirazzjoni.*

*Minbarra dan, l-interess generali jew pubbliku ghandu jibqa` jsehh ghaz-zmien kollu tal-indhil fit-tgawdija tal-gid tal-persuna (Kost. 10.10.2003 fil-kawza fl-ismijiet **<u>Francis Bezzina Wettinger et vs Kummissarju tal-Artijiet</u>**).*

*Illi huwa mghallem li, ghall-finijiet ta` l-artikolu 1, "there will be deprivation of property only where all the legal rights of the owner are extinguished by operation of law or by the exercise of a legal power to the same effect. ... In the absence of a formal extinction of the owner`s right, the Court has been very cautious about accepting that a de facto deprivation of property qualifies as a `deprivation` for the purposes of Article 1/2. De facto takings are generally understood to occur when the authorities interfere substantially with the enjoyment of possessions without formally divesting the owner of his title."*

*Ghalhekk, b`tehid ta` gid minghand is-sid ghall-finijiet ta` dan l-artikolu, jidher li wiehed ifisser il-kaz fejn il-jeddijiet proprjetarji jingiebu fix-xejn (Ara, per ezempju, Kost. 1.2.2008 fil-kawza fl-ismijiet **<u>Vincent Curmi noe et vs L-Onor. Prim Ministru et</u>**);*

*Illi minbarra dan, kif inghad aktar qabel, huwa accettat li s-setgha tal-Istat li jindahal biex b`ligi jikkontrolla l-uzu tal-gid taht l-artikolu 1 tal-Ewwel Protokoll hija setgha wiesgha*

*u diskrezzjonali. Dejjem tibqa` l-htiega li jintwera (mill-istess Stat) l-interess generali u l-bilanc xieraq bejn l-interessi tal-individwu u dak tal-komunita` (Kost. 8.1.2007 fil-kawza flismijiet **Gera de` Petri Testaferrata Bonici Ghaxaq vs L-Avukat Generali et**);*

*Illi, min-naha l-ohra, ghal dak li jirrigwarda l-indhil fl-uzu tal-gid min-naha tal-Istat, jidher li dan l-indhil jista` jiehu s-sura ta` kull ghamla ta` kontroll (bla ma jcahhad lis-sid mit-titolu), sakemm dan isir billi jithares il-bilanc bejn il-htiega ta` interess pubbliku jew generali u l-jeddijiet tas-sid fuq dak il-gid;*

*Illi filwaqt li huwa d-dmir tal-Istat li juri li t-tehid jew l-indhil sehh tassew fl-interess pubbliku jew generali (Kost. 24.5.2004 fil-kawza fl-ismijiet **Raymond Vella et vs Il-Kummissarju tal-Artijiet**), hemm qbil li, fejn jidhol dak li jitqies bhala "interess pubbliku", l-Istat igawdi firxa wiesgha ta` diskrezzjoni (Q.E.D.B. 23.11.2000 fil-kawza fl-ismijiet **The former King of Greece et vs Grecja** (Applik. Nru. 25701/94) § 87).*

*Madankollu, il-mod kif titwettaq dik id-diskrezzjoni jrid jghaddi mill-gharbiel tal-bilanc mistenni bejn l-interessi tas-socjeta` u dawk tal-individwu mgarrab bit-twettiq taghha, u dan kemm jekk l-eghmil ikun ta` tehid ta` proprjeta` u kif ukoll jekk ikun "semplicement" dwar indhil fl-uzu taghha (K. Reid **A Practitioner`s Guide to the European Convention on Human Rights** (3rd. Edit, 2007) pag. 501);*

*Illi huwa accettat ukoll li s-setgha moghtija lill-Istat li jikkontrolla l-uzu tal-gid ukoll ghal ghanijiet socjali jew fl-interess pubbliku trid titwettaq b`mod proporzjonali mal-interessi tas-sid privat fit-tgawdija ta` hwejgu. Din il-proporzjonalita` tinkiseb fis-sura ta` hlas ta` kumpens xieraq u ghalhekk jekk il-kumpens mahsub mil-ligi ma jkunx xieraq, jonqos l-element tal-proporzjonalita`.*

*Jekk jonqos dan l-element, ikun hemm ksur tal-jedd fundamentali ghat-tgawdija pacifika tal-gid kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni;*

*Illi huwa stabilit li, fejn jidhol l-aspett talproporzjonalita` taht il-Konvenzjoni "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual`s fundamental rights". This balancing approach known under the term of principle of proportionality has acquired the status of general principle in the Convention system." (Van Dijk, van Hoof, van Rijn, Zwaak* ***Theory and Practice of the European Convention on Human Rights*** *(4th Edit, 2006), § 17.4.2, f`pagg. 882 – 3) Dan l-element tal-proporzjonalita` kien kunsidrat b`reqqa mill-oghla Qorti f`Malta f`ghadd ta` kazijiet u l-Qorti tqis li ghandha taccenna ghalihom bla ma tidhol f`dettal ta` tismija mill-gdid (Ara Kost. 27.4.2012 fil-kawza fl-ismijiet* ***Michael Xerri et vs Avukat Michelle Tabone noe et*** *, fost bosta ohrajn);*

*Illi ma hemmx dubju li, fil-kaz li l-Qorti ghandha quddiemha, l-indhil li minnu jilminta r-rikorrent sehh bis-sahha ta` ligi (l-Att XXIII tal-1979). B`dik il-ligi, fir-rigward ta` postijiet li qabel kienu dekontrollati, fi tmiem ta` enfitewsi li taghlaq ta` post bhal dak, is-sid (i) ma setax aktar jippretendi li l-utilista johrog mill-post, imma l-ligi kienet tat lil dak l-utilista l-jedd li jibqa` joqghod fih bhala kerrej. Illi (ii) l-kirja kienet imgedda ghal zminijiet ta` hmistax-il (15) sena kull wahda, bil-hlas tal-kera regolat. Illi (iii) s-sid ma setax aktar jirrifjuta li jgedded il-kirja hlief fic-cirkostanzi imsemmija fl-istess dispozizzjonijiet, u (iv) ma setax jimponi kundizzjonijiet ohrajn hlief dawk ukoll stabiliti espressament.*

*Ghar-rigward tat-tehid lura tal-post minghand il-kerrej, is-sid irid juri lill-Bord li Jirregola l-Kera li l-kerrej ikun kiser il-kundizzjonijiet tal-kirja dwar hlas f`waqtu tal-kera, iz-zamma f`kundizzjoni tajba tal-post mikri u l-harsien tal-kundizzjonijiet miftehma, fosthom li ma jkunx inqeda mill-post b`uzu iehor minn dak miftiehem li l-post kien inkera*

*ghalih. Dwar il-kundizzjonijiet li s-sid jista` jimponi, il-kera ma baqax minghajr kontroll u seta` jizdied biss kull hmistax-il sena skond l-indici tal-inflazzjoni u ma jaqbizx id-doppju tal-ammont tal-perjodu ta` qabel. Ghal dak li jirrigwarda t-tiswijiet u z-zamma f`kundizzjoni tajba tal-post, sid il-kera ma setax jehles mir-rabta li jidhol ghall-ispejjez mehtiega jekk mhux qabel iressaq quddiem l-imsemmi Bord li Jirregola l-Kera certifikat minn perit arkitett u accettat mill-kerrej, li juri li l-post kien fi stat tajjeb ta` tiswija62. Qabel ma dahlu dawn id-dispozizzjonijiet, sid ta` post dekontrollat ma kienx marbut b`dawn il-kundizzjonijiet f`kaz li jikri l-post;*

*Illi fil-kaz tal-kirja li nhalqet favur l-intimati Ganado, dawn gew igawdu mill-bidliet li ddahhlu fil-ligi bl-Att XXIII tal-1979 kemm ghaliex il-post kien koncess lilhom b`enfitewsi temporanju bhala d-dar fejn joqoghdu u jghixu regolarment u kif ukoll ghaliex huma kienu cittadini Maltin. Tajjeb jerga` jinghad li meta l-intimati Ganado kisbu l-koncessjoni enfitewtika tal-post minghand ir-rikorrent, huma kienu ghamlu dan bil-weghda li johorgu mill-post malli jaghlaq iz-zmien miftiehem u sakemm ikunu ghadhom ma xtrawx post taghhom fejn kien fi hsiebhom imorru joqoghdu;*

*Illi l-Qorti hija tal-fehma wkoll li wiehed ma jistax jittraskura aspett ewlieni li johrog min-natura tal-kuntratt tal-enfitewsi. Jidher li dan l-aspett mhux kulhadd jaghraf is-siwi tieghu u jaghti `l wiehed x`jifhem li sahansitra quddiem il-Qorti ta` Strasbourg dan il-kuncett tal-kuntratt mhuwiex apprezzat kemm jisthoqqlu. Il-Qorti qieghda tirreferi ghall-fatt li l-kuntratt ta` enfitewsi jista` jixxiebah ma` bejgh, fejn l-utilista jinghata jeddijiet wesghin fuq il-gid moghti lilu b`enfitewsi u fejn id-direttarju jxidd (ghat-tul tal-koncessjoni) kwazi l-kontroll kollu fuq il-haga li jkun ta` b`enfitewsi, hlief ghall-gharfien tad-dirett dominju tieghu bil-hlas tal-"canone". Dan ifisser li l-"canone" jew cens li kien ikun impost f`koncessjoni enfitewtika ma kienx tabilfors jitkejjel mas-siwi intrinsiku jew skond is-suq tal-gid li jkun qieghed jinghata b`enfitewsi, izda kien ikun hlas nominali bhala turija biss tal-ezistenza tal-jeddijiet tal-*

*padrun dirett. Fil-bicca l-kbira tal-kazijiet, din kienet tkun ghazla konxja u hielsa tal-koncedent direttarju;*

*Illi meta, ghalhekk, l-artikolu 12 tal-Kapitolu 158 rabat il-kejl tal-hlas tal-kera l-gdida ex lege ma` kemm kien l-ammont tal-"canone" li jithallas matul il-koncessjoni enfitewtika, kienet qieghda tinhalaq sitwazzjoni li tabilfors iddarras lill-padrun dirett fl-gheluq tal-imsemmija koncessjoni. Kemm hu hekk, it-taqbil li llum isir dwar il-valur lokatizju ta` fond li seta` kien inghata b`enfitewsi li taghlaq, iwassal ghar-rizultati kontrastanti mal-kejl tal-kera dovuta marbuta mal-ammont ta` "canone" li kien iffissat liberament bejn il-kontraenti, kif jidher li kien il-kaz fil-koncessjoni enfitewtika originali bejn ir-rikorrent u l-intimat Ganado. Dan il-fattur issa jidher li huwa wkoll rizultat li johrog f`bosta kazijiet fejn wiehed jigi biex iqis l-aspett tal-proporzjonalita` tal-mizura fil-konfront tat-tgawdija tal-jedd tas-sid fuq hwejgu;*

*Illi minhabba f`hekk, jibqa` fatt mhux kontestat li t-tigrib li jsib ma` wiccu l-padrun dirett meta taghlaq koncessjoni (sub-) enfitewtika mhuwiex daqstant minhabba r-riperkussjonijiet tal-ghazla tieghu li jimponi "canone" mhux kalibrat mal-valur fis-suq tal-immobbli,daqskemm minhabba l-fatt li, fl-gheluq tal-imsemmija koncessjoni, sejra tinhalaq kirja mkejla fuq u b`rabta` mal-imsemmi "canone" u liema kirja zzomm milli l-immobbli bil-benefikati mtellghin fuqu jerga` lura ghand sidu. Kif sewwa inghad f`dan ir-rigward "il-fatt illi l-ligi taghti lis-sid il-jedd biss illi l-kera jzomm il-valur monetarju tieghu bla konsiderazzjoni ghall-fatt illi s-sid gie mcahhad mill-possibilita` li jiehu l-fond lura jew li jikrih b`kundizzjonijiet aktar vantagguzi, u l-fatt ukoll illi l-ligi ma tahseb ghal ebda mekkanizmu biex tkun valutata tassew il-htiega socjali tal-kerrej ghal kirja protetta, u ma tahsibx ghall-possibilita` li dik il-htiega tigi mqabbla mal-htiega, li tista` tkun xejn anaqas socjali, tas-sid, jaghmlu l-ligi nieqsa minn dawk l-elementi li joholqu bilanc u proporzjon bejn il-htiega genwina ghall-akkomodazzjoni socjali u li ccahhad lis-sid mit-tgawdija ta` hwejgu" (Kost 30.9.2016 fil-kawza fl-ismijiet* ***Maria Stella Azzopardi Vella et vs Avukat Generali et*** *§20);*

*Illi fis-sottomissjonijiet tieghu, ir-rikorrent jghid li bil-bidliet li saru fil-ligi matul iz-zmien li kienet ghadha miexja l-koncessjoni enfitewtika originali, huwa garrab hsara kemm f`dak li jirrigwarda l-ammont ta` dhul li seta` jippretendi bi dritt minghand l-utilista u kif ukoll bil-fatt li lanqas seta` aktar jiehu l-post lura f`idejh mal-gheluq tal-istess koncessjoni, minkejja li jghid li wliedu kellhom bzonnu biex jghixu fih huma.*

*Ghalhekk, jghid li huwa qieghed illum bla htija tieghu jgorr il-piz ta` rabta legali li ma kienet bl-ebda mod mahsuba meta dahal fis-sehh l-Att XXIII tal-1979.*

*Ikompli jargumenta li l-fatt li hu accetta ghal numru ta` snin il-kera minghand l-intimati Ganado wkoll wara li kien ghalaq iz-zmien konvenzjonali ma jnaqqas xejn mill-fatt li jezisti zbilanc bejn l-interessi tieghu dak milhuq mill-interess pubbliku. Jishaq li l-kera li jdahhal illum minghand l-intimati Ganado – elfejn disa` mija u hdax-il euro u tlieta u ghoxrin centezmi (€ 2911.23) kull sena – jgibu mqar sbatax fil-mija (17%) tal-valur lokatizju xieraq li l-post kien stmat mill-perit tekniku mqabbad mill-Qorti li jista` jgib f`kera fiz-zmien li nfethet din il-kawza. Jghid ukoll li tassew ghandu bzonn il-post kemm ghalih u ghal martu u bil-ligi kif inhi ma jistghux johduh f`idejhom, filwaqt li wliedhom kellhom ifittxu post ghalihom biex jikruh bi hlas ta` kera gholi. Huwa jishaq li fid-dawl tal-ksur tal-jedd li huwa qieghed igarrab, ir-rimedju xieraq ghandu jkun il-hlas ta` kumpens ghat-telf ta` kera minn dak inhar li l-koncessjoni enfitewtika ntemmet u nhalqet il-kirja sallum, imqabbla ma kemm kien inkera l-post li kieku kien hieles biex jinkera fuq is-suq; u kif ukoll li l-post jintraddlu lura battal mill-kerrej, ghaliex anqas minn hekk, il-hsara li qieghed igarrab tibqa` ma tissewwiex;*

*Illi, min-naha taghhom l-intimati Ganado jishqu hafna fuq il-fatt li r-rabta kuntrattwali li nhalqet bil-ftehim tal-2009 ma tistax tissarraf fi ksur tal-jeddijiet tar-rikorrent. Huma jghidu li nqdew b`jedd li taghtihom il-ligi u ma jistghux iwiegbu ghall-ilment ta` ksur ta` jedd fundamentali li ma halquhx huma.*

*Itennu li lanqas ma tista` tintlaqa` t-talba tar-rikorrent biex din il-Qorti tordnalhom johorgu mill-post u li lanqas ma huwa xieraq li huma jkunu kundannati jhallsuh kumpens, imma jekk tassew hemm ksur taljeddijiet tar-rikorrenti, hu l-Istat li ghandu jhallas kumpens bhal dak;*

*Illi l-intimat Avukat Generali jargumenta li l-Konvenzjoni taghti lill-Istat setgha wiesgha biex jindahal fil-jedd ta` tgawdija tal-possedimenti tal-privat ghal interess pubbliku. Izid jghid li r-rikorrent minn rajh biddel il-binarji ta` din il-kawza hekk kif qataghha li jidhol f`kuntratt ta` kirja gdid mal-intimati Ganado li ma baqghetx aktar marbuta mad-dispozizzjonijiet tal-Kapitolu 158 tal-Ligijiet ta` Malta.*

*Izid jghid li wkoll kieku l-Qorti kellha ssib li d-dispozizzjonijiet tal-artikolu 12 tal-Kapitolu 158 kienu jiksru l-jedd fundamentali tar-rikorrent, b`daqshekk ma jgibx ukoll il-hall tal-ftehim ta` kirja li sar fl-2009 bejnu u l-intimati Ganado u li fadallu sa Novembru tal-2023 biex jaghlaq u b`harsien tar-regola li l-kuntratti jorbtu lil min jidhol fihom – pacta sunt servanda – u jridu jitwettqu b`bona fidi. L-intimat jghid li ma hemm l-ebda dubju li meta ghaddiet il-ligi fl-1979, l-Istat kien qieghed jaghmel dan b`ghan legittimu fejn l-indhil kien jinvolvi t-thaddim ta` politika socjali u ekonomika f`qafas ta` interess pubbliku u ta` gustizzja socjali. Jghid li dik il-ligi kienet taqa` fil-parametri tat-tieni paragrafu tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni u zzomm bilanc gust bejn l-ghan socjali mahsub wara dik il-ligi u r-rispett u l-harsien tal-jeddijiet fundamentali tas-sidien dwar it-tgawdija ta` hwejjighom. L-ghan socjali wara l-bidliet fil-ligi bl-Att XXIII tal-1979 – dak li fl-interess pubbliku ikun assigurat li jkun hemm provvista ta` djar fejn wiehed jghix ghal min ikun nieqes minn tali akkomodazzjoni minhabba ragunijiet finanzjarji u socjali – kien maghruf ukoll mill-Qorti ta` Strasbourg f`bosta sentenzi li tressqu quddiemha minn applikanti minn Malta. Itemm jghid li llum il-gurnata l-ligi regghet inbidlet u saret izjed favorevoli ghas-sidien u jolqtu lir-rikorrenti wkoll;*

*Illi din il-Qorti tqis li, fic-cirkostanzi tal-kaz, ma jistax jinghad li r-rikorrent gie "privat" jew imcahhad minn hwejgu ghall-finijiet tat-tifsira moghtija fl-ewwel paragrafu tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni.*

*Madankollu, ma hemm l-ebda dubju li, bis-sahha tal-Att XXIII tal-1979, sehh indhil sostanzjali fit-tgawdija ta` hwejgu b`mod li l-ilment tieghu jaqa` biex jitqies taht it-tieni paragrafu tal-istess artikolu. Kif inghad qabel, filwaqt li dak l-indhil huwa legali (ghaliex huwa sewwasew l-effett ta` ligi mghoddija mill-Parlament), u filwaqt li ma hemm l-ebda dubju li l-ghan li ghalih kienet ghaddiet il-ligi kien dak li jipprovdi akkomodazzjoni mharsa lil ghadd ta` persuni, wiehed irid jara jekk dak l-indhil kienx wiehed meqjus jew proporzjonali jew jekk, minhabba fih, is-sid tal-gid (f`dan il-kaz partikolari r-rikorrent) intalabx jerfa` piz zejjed u sproporzjonat fit-tgawdija tal-jedd tieghu meta mqabbel mal-ghanijiet li ghalihom dik il-ligi ddahhlet fis-sehh;*

*Illi l-Qorti jidhrilha li jixraq tqis li, qabel ma ddahhlu fis-sehh id-dispozizzjonijiet tal-artikolu 12 tal-Kap 158, fil-ligi kien diga` ilu s-snin li ddahhlu dispozizzjonijiet li jharsu lill-kerrejja ta` postijiet urbani. Kemm hu hekk, id-dispozizzjonijiet tal-Kap 158 kienu jirrapprezentaw eccezzjoni ghal dawk id-dispozizzjonijiet u l-kelma "dekontrollat" kienet tirreferi sewwasew ghat-tnehhija ta` certi fondi "godda" mill-morsa tad-dispozizzjonijiet tal-ligijiet il-qodma, jekk ikunu mharsa certi kundizzjonijiet hemm preskritti.*

*Dan ifisser li l-Kap 158, sal-1979, kien eccezzjoni ghar-regola ta` x`jigri minn post urban moghti b`koncessjoni enfitewtika meta tintemm il-koncessjoni miftehma.*

*Mela, meta ddahhlu fis-sehh id-dispozizzjonijiet tal-ligi bl-Att XXIII tal-1979, il-legislatur kien qieghed jerga` johloq eccezzjoni fl-eccezzjoni u jikkontrolla x`setghat kien ikollu s-sid ta` post iddekontrollat fl-eghluq ta` koncessjoni enfitewtika u x`jeddijiet kien ikollu l-okkupant tal-istess post fi tmiem koncessjoni bhal dik;*

*Illi l-Qorti thoss li din il-precizazzjoni hija mehtiega fil-kaz li ghandha quddiemha llum – b`mod partikolari f`dak li jirrigwarda l-kriterju tal-proporzjonalita` – ghaliex biha johrog car li d-dispozizzjonijiet tal-Att XXIII tal-1979 kienu ndhil legislattiv meta fl-ordinament guridiku Malti kienu jezistu diga` ligijiet ohrajn li jipprovdu ghall-harsien tal-akkomodazzjoni socjali kemm f`dak li jirrigwarda s-setghat tal-Istat li jiehu b`rekwizizzjoni gid immobbli privat biex jaghtih b`kiri lil min kien jehtiegu, u kif ukoll f`dak li jirrigwarda l-kiri ta` postijiet qodma f`dak li jirrigwarda r-relazzjonijiet u d-drittijiet privati bejn sidien u kerrejja;*

*Illi, minbarra dan, il-bidliet li ddahhlu fil-ligi bl-Att XXIII tal-1979 inghatalhom effett retrospettiv, jigifieri saru jghoddu wkoll ghal koncessjonijiet enfitewtici ta` postijiet dekontrollati moghtija qabel ma gie fis-sehh l-imsemmi Att. Dan ifisser li, fi tmiem koncessjoni bhal dik, tnisslu effetti u konsegwenzi legali li l-partijiet kontraenti ma kellhomx f`mohhhom meta ntrabtu bil-ftehim tal-istess koncessjoni enfitewtika ta` post bhal dak. Dawn l-effetti u konsegwenzi ghabbew aktar lis-sidien u iffavorew lill-utilisti li mbaghad, b`daqqa ta` pinna, saru kerrejja. Dawn l-effetti u konsegwenzi ma baqghux jghoddu fil-kaz fejn kirjiet ta` postijiet dekontrollati saru fl-1 ta` Gunju, 1995 jew wara dakinhar. Minhabba f`hekk, il-kirja mertu tal-kaz tal-lum ma setghetx tiehu beneficcju minn din il-liberalizzazzjoni;*

*Illi b`zieda ma` dan kollu, kien biss wara bosta snin minn mindu r-rikorrent sab ruhu milqut minn dawn il-bidliet legislattivi li minnhom tant jilminta li fetah din il-kawza fl-2015. Dan ma jfissirx li b`daqshekk tilef l-istatus tieghu ta` "vittma" tal-ligi li minnha jilminta, izda din ic-cirkostanza taf thalli tabilfors impatt fuq il-kwalita` tal-ilment imressaq (Kost. 25.10.2013 fil-kawza fl-ismijiet **Dr Cedric Mifsud et vs L-Avukat Generali et**) u wkoll fuq ir-rimedju moghti (Kost. 3.3.2011 fil-kawza fl-ismijiet **Dr David Tonna et vs Kummissarju tal-Artijiet et**).*

*Ghalkemm f`dan ir-rigward irid jinghad ukoll li l-fatt li l-ligi ma timponix fuq sid zmien sa meta jmissu jiftah proceduri dwar ilment ta` ksur ta` jedd fundamentali tqies mill-Qorti*

*fi Strasbourg bhala "questionable" li l-Qorti domestika tiehu qies tad-dewmien fit-tnedija tal-proceduri bhala wiehed mill-kriterji li fuqu jitkejjel il-kumpens (Ara Q.E.D.B. 30.8.2016 fil-kawza fl-ismijiet* ***Montanaro Gauci et vs Malta*** *(Applik. Nru. 31454/12) §45);*

*Illi meta l-Qorti tigi biex tqis jekk l-indhil li r-rikorrent garrab huwiex wiehed li joqghod ghall-htigijiet tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, trid taghmel "an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are `practical and effective`. It must look behind appearances and investigate the realities of the situation complained of.*

*In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State`s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord`s property rights are neither arbitrary nor unforeseeable" (Q.E.D.B. 11.12.2014 fil-kawza fl-ismijiet* ***Anthony Aquilina vs Malta*** *(Applik. Nru. 3851/12) §60);*

*Illi meta wiehed iqis il-fatturi u c-cirkostanzi kollha marbuta mal-kaz, wiehed isib li l-piz finanzjarju ghadu mitfugh kollu fuq ir-rikorrent sallum. Dan johrog l-izjed meta wiehed iqis il-valur li l-post kien meqjus li jista` jinkera kemm fiz-zmien meta ghalqet il-koncessjoni enfitewtika u kif ukoll kemm kien jinkera llum li kieku ma kinetx fis-sehh il-ligi kif inhi b`effett tal-Att XXIII tal-1979. Il-perit tekniku sab li fis-sena meta ghalqet il-koncessjoni enfitewtika maghmula lill-intimati Ganado (jigifieri f`Dicembru tal-1993) il-valur li bih il-post kien jista` jinkera kien ta` erbat elef disa` mija u sitta u hamsin euro (€ 4,956) fis-sena filwaqt li llum l-istess appartament kien jista` jinkera ghal sbatax-il elf u seba` mitt (€17,700) fis-sena. Meta l-koncessjoni enfitewtika ntemmet u nhalqet il-kirja ope legis (fl-1993) l-oghla kera li seta` jintalab minghand l-intimati Ganado kien ta` elfejn u*

*tnejn u ghoxrin euro (€2,022) fis-sena, filwaqt li ghat-tieni tigdida tal-kirja ghal hmistax-il (15) sena sat-30 ta` Novembru, 2023, il-kera li l-intimati Ganado huma tenuti jhallsu hu ta` elfejn disa` mija u hdax-il euro u tnejn u ghoxrin centezmi (€ 2,911.22) fis-sena;*

*Illi dan ifisser li filwaqt li meta nhalqet il-kirja l-kera li seta` jintalab minghand l-intimati Ganado kien jitla` ghal madwar wiehed u erbghin fil-mija (41%) tal-valur lokatizju xieraq tal-post, issa l-kera dovut bilkemm ilahhaq is-sbatax fil-mija (17%) tal-valur lokatizju xieraq tal-istess post illum. Jigifieri aktar ma qieghed jghaddi z-zmien jirrizulta li aktar qieghed jikber id-distakk bejn dak li jithallas b`kera u dak li jixraq jithallas. Meta wiehed iqabbel il-kera dovuta mal-kera li l-post jista` jinkera bih li kieku ma kienx maqbud taht l-effetti tal-Att XXIII, wiehed isib li hemm disproporzjon qawwi bejn qaghda u ohra u li dan id-disproporzjon qieghed igarrbu r-rikorrent wahdu, minkejja l-ghanijiet legittimi u socjali li l-ligi qieghda tilhaq fir-rigward tal-intimati Ganado;*

*Illi ghalhekk, il-Qorti tasal ghall-fehma li fil-qaghda li jinsab fiha r-rikorrent illum u ladarba l-bidliet li regghu saru fil-ligi baqghu ma indirizzawx ghal kollox qaghda bhal dik li jinsab fiha r-rikorrent, u kif ukoll fid-dawl tat-tifsira li nghataw id-dispozizzjonijiet rilevanti tal-Kap 158 kif mibdula bl-Att XXIII tal-1979, kemm mill-qrati ta` kompetenza kostituzzjonali Maltin (Kost. 29.4.2016 fil-kawza fl-ismijiet* ***Maria Ludgarda Borg et vs Rosario Mifsud et****) u kemm tal-Qorti ta` Strasbourg (Q.E.D.B. 15.9.2009 fil-kawza fl-ismijiet* ***Amato Gauci vs Malta*** *(Applik. Nru. 47045/06) §§51 –2; u Q.E.D.B. 11.12.2014 fil-kawza fl-ismijiet* ***Anthony Aquilina vs Malta*** *(Applik. Nru. 3851/12) §66 – 7 fost ohrajn), jirrizulta li r-rikorrent garrab u qieghed igarrab ksur tal-jedd tieghu ghat-tgawdija pacifika ta` hwejgu kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni u dan minhabba li d-dispozizzjonijiet tal-artikolu 12(2) u (3) imsemmi Kap 158 iqieghed fuqu piz sproporzjonat meta mqabbel mal-ghan li ghalih iddahhlu fis-sehh l-istess dispozizzjonijiet;*

*Illi, madankollu, safejn l-ewwel talba tar-rikorrent, kif imfassla, torbot il-ksur imgarrab minnu mal-fatt li d-dispozizzjonijiet tal-artikolu 12 tal-Kap 158 "jirrenduha impossibbli lir-rikorrenti li jirriprendi l-pussess tal-proprjeta` tieghu" din il-Qorti diga` qalet aktar qabel li dan ma jidhirx li huwa l-kaz. Huwa tabilhaqq izjed iebes u difficli li r-rikorrent isehhlu jnehhi lill-intimati Ganado mill-post – l-aktar minhabba l-ftehim tal-kirja li ghadu ghaddej – izda l-ligi ma taghlaqx il-bieb lilu biex jinghata dak ir-rimedju u l-procedura u l-access ghal tribunal indipendenti u imparzjali biex jilhaq dak il-ghan huwa disponibbli lilu bhalma huwa disponibbli ghal kull sid iehor ta` post mikri bhala residenza protetta jew `kontrollata`. Dan il-punt jinghad b`aktar qawwa fid-dawl tal-effetti li din il-Qorti tqis li jinhalaq bis-sejbien tal-ksur tal-artikolu 1 tal-Ewwel Protokoll meta meqjus l-artikolu 12 tal-Ordinanza. Ghalhekk, il-Qorti ma ssibx li tassew jezisti ksur tal-jedd fundamentali tarrikorrent taht l-ewwel talba tieghu ghar-raguni li huwa jaghti f`dik it-talba;*

*Illi b`daqshekk ma jfissirx li l-Qorti ma tistax issib ksur tal-jedd taht it-tieni talba tar-rikorrenti. Ghalkemm fid-dehra taghha din it-tieni talba tista` tkun konsegwenzjali ghall-ewwel talba, huwa car ghal din il-Qorti li r-rikorrenti tassew qieghed igarrab ksur tal-jedd tieghu kif imhares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni ghar-ragunijiet imsemmijin aktar `il fuq u li ma hemmx ghalfejn jergghu jissemmew. B`mod partikolari, ma jistax jinghad li, minn dak li hareg mill-fatti u mill-konsiderazzjonijiet li saru aktar qabel, it-tieni talba ma tistax triegi fuq is-sahha taghha, safejn imsejsa fuq ksur tal-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni. Dan qieghed jinghad ghaliex din il-Qorti waslet ghall-fehma li r-rikorrenti qieghed igarrab ksur tal-jedd tieghu taht l-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni minhabba li l-piz li l-ligi qieghda ggeghelu jgorru huwa wiehed sproporzjonat meta mqabbel mal-ghan li ghalih l-indhil kien mahsub li jirregola favur l-intimati.*

*Ghalhekk, it-tieni talba hija tajba u sejra tintlaqa` u dan safejn titlob is-sejbien ta` ksur ta` jedd fundamentali taht il-Konvenzjoni."*

## 4. Konsiderazzjonijiet ta` din il-Qorti

Fil-kaz tal-lum, is-subcens ghal 21 sena beda jiddekorri fl-1977. Mill-kuntratt jirrizulta li l-hsieb tas-sidien kien illi l-koncessjoni tkun temporanja propju ghal zmien 21 sena. Waqt li kienet ghaddejja l-koncessjoni, dahlu fis-sehh l-emendi ghall-Kap 158 bis-sahha tal-Att XXIII tal-1979. Bl-applikazzjoni tal-Art 12(2) u (3) tal-Kap 158, mal-gheluq tal-21 sena, ic-cens seta` jkun konvertit *ope legis* f`kera. Hekk sar.

Kemm kellha tithallas kera ma thalliex aktar ghall-kontrattazzjoni libera ta` bejn is-sid u l-inkwilin (gia` censwalist) [kif kien il-kaz meta nghatat il-koncessjoni] izda kienet determinata mil-ligi stess. Meta nghatat il-koncessjoni fl-1977 il-partijiet kienu liberi illi jikkontrattaw dawk il-pattijiet u kondizzjonijiet, inkluz ukoll l-ammont tal-kera u z-zmien tal-koncessjoni. Din il-liberta` tqeghdet fil-genb mil-legislatur bis-sahha tal-Att XXIII tal-1979.

**Fir-rikors promotur (<u>mhux meta xehed ir-rikorrent</u>) ir-rikorrenti jiddeskrivu l-Att XXIII tal-1979 bhala "ligi infami".**

**Ghal din il-Qorti, l-uzu tal-kelma "infami" kienet zejda ghaliex ma kienx hemm bzonnha minn kull aspett.**

**Fl-ewwel lok ghaliex jidher li min kiteb ir-rikors promotur jista` jkun li ma fehemx bizzejjed l-origini, it-tifsira, u s-sinjifikat tal-kelma "infami".**

**Fit-tieni lok ghaliex ghalkemm il-frazi tidher fir-rikors promotur, meta xehed, ir-rikorrent ma tax l-impressjoni li kien qed jixhed dwar "ligi nfami", fis-sens li nghatat fir-rikors promotur.**

**Fit-tielet lok ghaliex fuq l-iskorta ta` medda taz-zmien jirrizulta li l-Att XXIII tal-1979 kien kollox hlief "infami".**

**F`socjeta` demokratika, kull persuna ghandha l-jedd tesprimi ruhha liberament kif trid il-ligi. Il-qrati huma tarka ghall-harsien ta` dak id-dritt. Fl-istess waqt din il-Qorti tishaq illi fil-mod u manjiera kif tigi amministrata l-gustizzja, specjalment fejn ikunu sejrin jigu determinati drittijiet tal-persuna, l-uzu tal-aggettivi - u "infami" huwa aggettiv - ghandu jkun ridott ghall-essenzjal, ghaliex il-qrati jafu, minghajr wisq enfasi, x`inhuma d-dmirijiet u r-responsabilitajiet taghhom.**

**Hekk tiddetta l-gustizzja u maghha "the rule of law".**

Ghal din il-Qorti, huwa evidenti li ma kienx kapriccjuz il-mottiv tal-legislatur li jaghmel kontroll ta` kemm kellha tithallas kera wara l-gheluq tac-cens temporanju ghaliex ried jevita s-sitwazzjoni li l-kera toghla f`regim mhux kontrollat u b`hekk ried jevita li l-persuna ma tkunx tiflah thallas u tispicca barra t-triq.

Wara li dahal fis-sehh l-Att XXIII tal-1979, mal-medda tas-snin, fuq firxa wiesgha tal-hajja socjali ta` pajjizna, irrizulta li bil-konverzjoni ghal kera, beda jinhass sewwa t-telf li garrab is-sid fil-kontrattazzjoni libera, u fuq kollox tilef il-kontroll fuq kemm kellu jircievi kera ; dan tal-ahhar ghaliex l-ammont tal-kera kien stabbilit mil-legislatur b`formola pre-determinata marbuta. Ghal snin twal il-formola baqghet dik li kien kienet fl-1979. Inoltre l-indici ta` inflazzjoni ufficjali fattwalment ma kienx jirrifletti l-inflazzjoni reali prevalenti fil-pajjiz.

Ghalkemm, kif diga` nghad, fir-rikors promotur sar uzu tal-aggettiv "infami" b`riferenza ghall-Att XXIII tal-1979, din il-Qorti ma ssibx li r-rikorrenti ghamlu l-prova li l-legalita` tal-legislazzjoni kellha tkun kontestata. Lanqas bil-provi li ghamlu r-rikorrenti ma qeghdin jikkontestaw il-legittimita` tal-iskop ghaliex saret.

Certament pero` jilmentaw mill-fatt illi ghalihom l-applikazzjoni tal-emendi ghall-Kap 158 tikkostitwixxi ksur tal-Art 1 Prot 1 tal-Konvenzjoni ghad-detriment taghhom ghaliex jirrizulta sproporzjon qawwi kontra taghhom fil-kera li jistghu jippercepixxu li kieku t-tgawdija tal-propjeta` kellha tithalla tilhaq il-milja taghha.

Il-Qorti tishaq illi l-Att XXIII tal-1979 kien motivat minn skop legittimu u fl-interess pubbliku ghaliex kien immirat sabiex jara li jkun hemm akkomodazzjoni lil firxa wiesgha ta` nies u sabiex ibieghed ir-riskju ta` zgumbrament minn fond fejn dawk in-nies ikunu ilhom jabitaw fih is-snin bhala r-residenza ordinarja taghhom. Is-sitwazzjoni ekonomika u socjali fil-pajjiz dak iz-zmien li sar l-Att XXIII tal-1979 kienet tirrendi necessarju li jkun hemm ligi li tipprova tohloq bilanc bejn interessi konfliggenti. It-tkattir tal-gid fil-kors tas-snin, kif ukoll l-influwenza li kellha fuqna l-gurisprudenza tal-ECtHR wara l-1987, urew illi dak l-intervent legislattiv, ghalkemm kien legittimu, ma kienx baqa` joffri bilanc, anzi addirittura holoq sproporzjon u zvantagg konsiderevoli ghad-dannu tas-sidien. Huwa ppruvat illi r-rata ta` kera li r-rikorrenti setghu jippercepixxu bl-effett tal-Art 12(2) tal-Kap 158, komparat mal-kera li tista` tingieb fis-suq hieles, oggettivament hija baxxa u tixhed dan l-isproporzjon, kienet x`kienet ir-raguni ghala r-rikorrenti akkwistaw il-fond de quo fl-2017 b`inkwilin go fih. Illum is-sitwazzjoni ekonomika tal-pajjiz, fuq kull livell, hija ferm ahjar minn dik li kienet fl-1979, meta l-legislatur hass il-htiega – din il-Qorti tghid – impellenti – li jghaddi l-emendi ghall-Kap 158.

Matul iz-zmien anke l-legislatur deherlu li kellu jqis mill-gdid ic-cirkostanzi li wassluh biex jintervjeni fl-1979 fl-isfond tal-bidla lejn l-ahjar fil-qaghda ekonomika u socjali tal-pajjiz, li gabet sfidi godda. Inoltre il-gurisprudenza tal-ECtHR beda jkollha l-effett taghha. Fil-fatt, wara d-dhul fis-sehh tal-Att XXXI tal-1995, sar l-Art 16(3) tal-Kap 158 li bis-sahha tieghu d-dispozizzjonijiet ta` l-Art 12 ma kellhomx isib aktar applikazzjoni fil-kaz ta` kuntratti ta` enfitewsi temporanja li jkunu saru fl-1 ta` Gunju 1995 jew wara. Barra minn hekk, bl-emendi tal-2009 u tal-2010 ghall-Kap 16, il-kera kellha tizdied kull tlett snin (mhux kull 15-il sena kif kien l-istat tad-dritt bl-emendi tal-1979). Cio` nonostante xorta wahda dawn l-emendi ma sehhilhomx jilhqu dak il-proporzjon li jrid l-Art 1 Prot 1 tal-Konvenzjoni, ghaliex ghalkemm bl-emendi tal-2009 kien hemm titjib ghas-sid mas-sitwazzjoni precedenti, is-sid baqa` kostrett joqghod ghal

zieda fil-kera dettata mil-ligi, li stabbiliet mhux biss kemm ghandu jkun l-awment izda anke kull meta.

Fid-decizjoni taghha tal-11 ta` Dicembru 2014 fil-kaz ta` **<u>Anthony Aquilina vs Malta</u>** l-ECtHR irrimarkat illi : "*the 2009 and 2010 amendments (only) slightly improved a landlord`s position*".

Fis-sentenza tas-27 ta` Marzu 2015 fil-kawza "**<u>Ian Peter Ellis et vs Avukat Generali et</u>**, il-Qorti Kostituzzjonali stabbiliet illi :-

> *"Lanqas l-emendi ghall-Kodici Civili li sehhew bl-Att tas-sena 2009 ma jistghu jitqiesu bhala li jaghtu rimedju effettiv ghall-lanjanzi tar-rikorrenti, kemm ghax tezisti diskrepanza enormi bejn l-awment fil-kera kontemplat fl-artikolu 1531C u l-valur lokatizju tal-fond fis-suq hieles, kif ukoll ghax id-disposizzjonijiet tal-artikolu 1531F, fic-cirkostanzi tal-kaz, jaghmlu remota l-possibilita` li dawn jipprendu l-pussess tal-fond taghhom."*

Il-Qorti diga` ghamlet osservazzjonijiet dwar l-Att XXVII tal-2018. L-introduzzjoni tal-Art 12B tal-Kap 158 kienet ntiza sabiex taghmel tajjeb ghall-futur mhux ghal vjolazzjonijiet imgarrba fil-passat. Ghalhekk, waqt illi fir-relazzjonijiet futuri ta` bejniethom, il-partijiet ghandhom ikunu gwidati mill-emendi l-aktar recenti, dawn l-emendi m`ghandhomx igibu fix-xejn it-talba tar-rikorrenti safejn din tirrigwarda vjolazzjonijiet precedent ghad-dhul fis-sehh tad-disposizzjoni appena citata.

**Ghalhekk filwaqt li qeghda tilqa` t-tieni talba limitatament safejn tirrizulta vjolazzjoni tad-dritt fondamentali tar-rikorrenti hekk kif dan jinsab imhares bl-Art 1 Prot 1 tal-Konvenzjoni, qeghda tichad l-eccezzjonijiet tal-intimati kull fejn dawn cahdu li kien hemm volazzjonijiet tal-jedd tar-rikorrenti skont l-Art 1 Prot 1 tal-Konvenzjoni.**

## VII. <u>It-talbiet l-ohra u r-relattivi eccezzjonijiet relatati tal-intimati</u>

Bit-tielet domanda, ir-rikorrenti talbu mill-qorti dikjarazzjoni u decizjoni li ghandhom jedd jithallsu kumpens u danni ghall-vjolazzjoni li garrbu..

Bit-tielet eccezzjoni, l-Avukat Generali eccepixxa li l-ilment tar-rikorrenti kellhu jigi nkwadrat u meqjus mid-data tal-akkwist tal-fond in kwistjoni mhux qabel. L-istess kien eccepit mill-intimati Camilleri fir-raba` eccezzjoni.

Ir-rikorrenti akkwistaw il-fond fit-30 ta` Mejju 2017. Qabel din id-data ma kellhom ebda relazzjoni mal-fond in kwistjoni. Ghalhekk ir-rikorrenti jistghu biss jilmentaw minn vjolazzjoni tad-drittijiet taghhom mill-mument meta huma saru sidien tal-fond. Zgur illi mhux il-kaz li jilmentaw minn xi vjolazzjoni ghaz-zmien ta` qabel meta ma kellhom ebda konnessjoni mal-post.

**Ghalhekk sejra tilqa` t-tielet eccezzjoni tal-intimat Avukat Generali u r-raba` eccezzjoni tal-intimati Camilleri.**

Il-kumpens li jista` jinghata fi procediment ta` natura kostituzzjonali mhuwiex ekwivalenti ghal danni civili li jigu likwidati mill-qrati ordinarji (ara : QK : **Philip Grech pro et noe vs Direttur tal-Akkomodazzjoni Socjali et** deciza fis-17 ta` Dicembru 2010 ; **Victor Gatt et vs Avukat Generali et** deciza fil-5 ta` Lulju 2011 ; u **Ian Peter Ellis et vs Avukat Generali et** deciza fl-24 ta` Gunju 2016).

Fis-sentenza li kienet inghatat fit-30 ta` Settembru 2016 fil-kawza fl-ismijiet : **Maria Stella sive Estelle Azzopardi et vs Avukat Generali et** : il-Qorti Kostituzzjonali kompliet tippreciza illi r-"*rimedju li taghti din il-Qorti huwa kumpens ghall-ksur tad-dritt fondamentali u mhux danni civili ghal opportunita` mitlufa."*

Huma diversi l-konsiderazzjonijiet li ghandhom isiru sabiex ikun determinat il-*quantum* tal-kumpens.

Decizjoni li qieset fid-dettall din il-kwistjoni kienet dik moghtija mill-Qorti Kostituzzjonali fil-kawza **Raymond Cassar Torregiani et vs Avukat Generali et** deciza fid-29 ta` April 2016.

Il-Qorti qalet hekk :-

*"Dwar il-quantum tal-kumpens dovut issir referenza ghas-sentenza ta` din il-Qorti* ***Igino Trapani Galea Feriol pro et noe et V Kummissarju tal-Artijiet et*** *deciza fil-31 ta` Ottubru 2014, fejn f`materja ta` komputazzjoni ta` kumpens ghal lezjoni ta` dritt fondamentali sancit fl-artikolu konvenzjonali fuq citat gie osservat :*

*"Rigward il-quantum tal-kumpens stabbilit mill-ewwel Qorti, din il-Qorti tosserva fl-ewwel lok li kull kaz ghandu jigi trattat u deciz fuq il-fattispecie tieghu. Barra minn hekk, jekk il-Qorti Ewropeja hasset li f` certi kazijiet kellha taghti kumpens f` ammont inferjuri ghal dak li nghata lir-rikorrenti mill-ewwel Qorti, ma jfissirx li allura l-Qrati Maltin tilfu l-awtonomija taghhom b` mod li bilfors kumpens li jinghata ikun f`ammont vicin dak li taghti l-Qorti Ewropeja. Fil-kaz odjern l-ewwel Qorti hadet in konsiderazzjoni l-fatturi kollha li jimmilitaw kemm favur kif ukoll kontra r-rikorrenti u deherilha li l-kumpens xieraq li ghandha taghti f` dan il-kaz ikun fl-ammont ta` hamsa u ghoxrin elf Euro (EUR 25,000). Hija kkonsidrat id-dewmien da parti tar-rikorrenti li jiehdu l-proceduri opportuni, il-valur tal-immobbli, iz-zmien tant twil li r-rikorrenti ilhom privati mill-godiment tal-proprjeta` taghhom minghand ma nghata ebda kumpens, l-istat tal-fond u l-ezistenza tal-fattur tal-interess pubbliku. Ma` dawn ghandu jigi senjalat il-fatt li qabel l-ispossessament tal-proprjeta` taghhom ir-rikorrenti kellhom permess mill-Bord kompetenti sabiex jizviluppaw il-fond."*

*Issa ghalkemm, huwa minnu illi l-valur tal-kumpens akkordat mill-Qorti wara sejba ta` lezjoni tad-drittijiet*

*fondamentali ma jekwiparax necessarjament ma` likwidazzjoni ta` danni civili attwali sofferti, ma jfissirx li d-danni materjali ghandhom jigu injorati ghall-finijiet tal-ezercizzju odjern. Il-Qorti trid tqis il-fatturi kollha rilevanti ghall-kaz odjern sabiex tasal ghad-determinazzjoni tal-quantum. Dawn huma (1) it-tul ta` zmien li ilha ssehh il-vjolazzjoni konsidrat ukoll fid-dawl tat-tul taz-zmien li r-rikorrenti damu sabiex resqu l-proceduri odjerni biex jirrivendikaw id-drittijiet kostituzzjonali taghhom ; (2) il-grad ta` sproporzjoni relatat mal-introjtu li qed jigi percepit ma` dak li jista` jigi percepit fis-suq hieles, konsidrat ukoll l-ghan socjali tal-mizura; (3) id-danni materjali sofferti mir-rikorrenti konsidrat ukoll l-ispejjez sostanzjali li ghamlu l-intimati Tabone ssabiex jirrendu l-fond abitabbli u (4) l-ordni li ser taghti din il-Qorti dwar l-ezenzjoni f` dan il-kaz mill-effetti legali tal-Artikolu 5 tal-Kap 158."*

Meta jinghata kumpens fi procediment ta` din ix-xorta, ghandha tinghata konsiderazzjoni ghall-fatt illi l-ghan li jkun immotiva l-mizura u cioe` l-interess pubbliku (ghall-fini ta` quantum ta` kumpens u relattiva motivazzjoni, ara dawn id-decizjonijiet li jirreferu wkoll ghall-pronunzjamenti tal-ECHR :- QK : **Angela sive Gina Balzan v. L-Onorevoli Prim Ministru** : op. cit. ; **Dr. Cedric Mifsud et vs l-Avukat Generali et** : op. cit. ; **Concetta sive Connie Cini vs Eleonora Galea et** : op. cit. ; **Robert Galea vs Avukat Generali et** : PA/GK : op cit ; **Sergio Falzon et vs Alfred Farrugia et** : PA/GK : op. cit. ; PA/GK : 15 ta` Frar 2018 : **Alessandra Radmilli vs Joseph Ellul et** ; PA/GK : 2 ta` Marzu 2018 : **Thomas Cauchi et vs Avukat Generali et**) [ara wkoll ghall-istess skop : ECHR : 30 ta` Jannar 2018 : **Cassar vs Malta** : Application 50570/13]

Il-Qorti tqis illi l-proceduri odjerni min-natura taghhom huma diretti sabiex jindirizzaw il-lezjoni kostituzzjonali jew konvenzjonali. Fil-fatt sabet illi kien hemm vjolazzjoni tad-drittijiet fundamentali tar-rikorrenti skont l-Art 1 Prot 1 tal-Konvenzjoni. Ghalkemm id-diskrepanza bejn il-kera attwalment percepita u l-valur lokatizju li l-fond *de quo* jgib fis-suq hieles hija fattur determinanti sabiex ikun stabbilit jekk kienx vjolat il-principju tal-proporzjonalita`, fl-istess waqt tajjeb jinghad illi fil-komputazzjoni tal-kumpens hemm fatturi ohra li wkoll ghandhom

rilevanza, u li flimkien ghandhom iwasslu ghall-ghoti ta` kumpens gust ghal-lezjoni subita.

Fis-sentenza li tat fil-31 ta` Jannar 2014 fil-kawza fl-ismijiet **<u>Concetta sive Connie Cini vs Eleonora Galea et</u>** il-Qorti Kostituzzjoni rrilevat :

> *"25. F`materja ta` kumpens il-gurisprudenza patria kif ukoll dik tal-Qorti Ewropeja identifikat is-segwenti principji :*
>
> *"The Court would reiterate that compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate balance on applicants. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference." [ECHR 31443/96 para.176 Bronoiswki v. Poland, decided 22 June 2004].*
>
> *26. Fil-kawza Louis Apap Bologna v. Calcidon Ciantar et deciza 24 Frar 2012, din il-Qorti osservat hekk:*
>
> *"F`kazijiet bhal dawn il-kumpens xieraq ghandu jiehu in konsiderazzjoni l-ghan legittimu li mmotiva l-mizura tarrekwizizzjoni u li l-kumpens jista` jkun anqas mill-kumpens shih li altrimenti jkun dovut skond il-kriterji tas-suq. Il-Qorti Ewropea fil-kazijiet ta` Edwards v Malta u Ghigo v Malta 17 Lulju 2008] ddecidiet li :*
>
> *"Para.76. As the Court has already stated on may occasions, in spheres such as housing of the population, States necessarily enjoy a wide margin of appreciation not only in regard to the existence of the problem of general concern warranting measures for control of individual property, but also to the choice of the measures and their implementation. The State control over levels of rent is one such measure and its application may often cause significant reductions in the amount of rent chargeable (….Mellacher and Others v Austria para.45]."*

*27. Inoltre, "In the absence of a formal expropriation that is to say a transfer of ownership, the Court considers that it must look behind the appearances to investigate the realities of the situation complained of!.. Since the Convention is intended to guarantee rights that are practical and effective it has to be ascertained whether that situation amounted to a de facto expropriation [Sporrong & Lonnroth v. Sweden 18/12/1994; ara ukoll kawza Perit Duminku Mintoff, supra]".*

*28. Fil-kaz in dizamina, l-ewwel Qorti waslet ghall-konkluzjoni li l-kumpens dovut ex lege lill-intimati bis-sahha tal-artikolu precitat huwa wiehed irizorju meta komparat mal-valur tal-fond fis-suq. L-Avukat Generali jhossu aggravat bil-fatt li fid-determinazzjoni tal-fattur tal-proporzjonalita` tal-mizura relattivament ghall-kumpens dovut, l-ewwel Qorti ma kellhiex timxi fuq l-istima tal-valur tal-fond fl-ammont ta` mija, hamsa u tletin elf Euro (€135,000) moghti ex parte mill-Perit inkarigat mill-intimati, izda se mai kellha timxi fuq l-istima ta` disghin elf Euro (€90,000) tal-Perit inkarigat mir-rikorrenti, stante li l-Konvenzjoni "ma tikkoncedi ebda dritt li xi hadd jircievi profitt, aktar u aktar fil-kuntest ta` proprjeta` li qed isservi ghall-finijiet ta` social housing."*

*29. Fir-rigward din il-Qorti tosserva li dan l-ilment tal-Avukat Generali huwa fondat. Inkwantu huwa konformi mal-principju, illum assodat kemm fil-gurisprudenza patrija kif ukoll f`dik tal-Qorti Ewropeja, li f`kaz ta` legislazzjoni li ghandha ghan socjali l-kumpens offrut jista` ma jkunx jekwivali ghall-valur tal-fond fis-suq.*

*30. Kif osservat il-Qorti Ewropeja fil-kaz Amato Gauci v. Malta, [Appl.47045/06, deciz 15 Dicembru 2009] :*

*"... [the Court] reiterating that legitimate objectives in the `public interest`, such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less that reimbursement of the full market value [see James and Others, cited above,*

*para.54 and Jahn and Others v Germany [GC] nos.46720/99, 72203/01 and 72552/01, para.94..]*

*31. Illi jirrizulta pacifiku li fiz-zmien meta nghatat il-koncessjoni sub-enfitewtika, fil-11 ta` Jannar 1960 ic-cens annwu kien gie stabbilit fl-ammont ta` £35, illum wiehed u tmenin Euro, tlieta u hamsin centezmi (€81.53), li bl-applikazzjoni tal-Artikolu 12 jizdied ghal erba; mija, disgha u tmenin Euro u tmintax-il centezmi (€489.18)3. Inoltre, l-utilista, allura perpetwa tista` tifdi c-cens versu l-prezz ta` disat elef u tmien mitt Euro (€9,800) li minnu ghandu jitnaqqas il-capital gains tax ta` 12%.*

*32. Din il-Qorti tikkondividi l-hsieb tal-ewwel Qorti li l-ammont ta` cens dovut ex lege lill-intimati huwa baxx sal-punt li ma jistax jinghad li ghat-tfixkil sostanzjali fit-tgawdija tal-proprjeta` taghhom huma nghataw kumpens adegwat, kemm ghax fiz-zminijiet tal-lum il-quantum tac-cens annwu dovut ex lege jitqies bhala wiehed baxx meta jigi relatat mal-valur tal-fond, kif ukoll tenut kont tal-konsiderazzjoni li lir-rikorrenti, okkupanti tal-fond b`titolu ta` uzufrutt biss, qed tinghatalha dritt gdid li tibqa` tokkupa l-fond b`titolu ta` enfitewsi perpetwa, bil-possibilita` tarripreza tal-pussess fiziku tal-fond da parti tas-sidien tkun wahda remota hafna. Huwa principalment dan il-fattur li, fil-fehema ta` din il-Qorti, jitfa` `a disproportionate and excessive burden` fuq is-siden.*

*33. Kif gja` osservat minn din il-Qorti fil-kawza Josephine Bugeja v. Avukat Generali, deciza 7 Dicembru 2009, ghad-determinazzjoni tal-fattur tal-proporzjonalita` ghandu jittiehed kont tal-effetti legali u prattici li l-applikazzjoni tal-artikolu ser iggib mieghu. Dan l-ezami ghandu jsir mhux in vacuo, izda skont il-fattispecje tal-kaz. "Huwa l-ezercizju ta` dak id-dritt fil-prattika u b`mod konkret, u mhux l-ezistenza tieghu fl-astratt, li jista` bhal fil-kaz in ezami, talvolta jammonta ghal-lezjoni ta` dritt fundamentali" [para.45]. Jigi ribadit li l-Qorti ghandha thares lejn l-effett prattiku tas-sitwazzjoni, peress li, kif sostnut mill-Qorti Ewropeja, il-konvenzjoni tiggarantixxi drittijiet li huma "practical and*

*effective" biex jigi stabbilit jekk is-sitwazzjoni fil-fatt tammontax ghal esproprijazzjoni de facto."*

Fis-sentenza ta\` din il-Qorti diversament presjeduta tas-7 ta\` Frar 2017 fil-kawza fl-ismijiet **Robert Galea vs Avukat Generali et**, (op. cit.) inghad :-

*Illi huwa llum stabilit li r-rimedju li tista\` taghti din il-Qorti huwa kumpens ghall-ksur tad-dritt fundamentali u mhux danni civili ghal opportunita\` mitlufa (Kost. 22.2.2013 fil-kawza fl-ismijiet Albert Cassar et vs Onor. Prim Ministru et). Biex tasal ghal dan, il-Qorti jehtigilha tqis ghadd ta\` fatturi, fosthom it-telf effettiv li jkun garrab is-sid, l-ghan socjali mahsub mil-ligi, il-grad ta\` sproporzjon fit-tqabbil bejn id-dhul attwali li qieghed jircievi r-rikorrent mad-dhul li jista\` jinkiseb fis-suq hieles, id-danni materjali li l-parti rikorrenti tista\` tipprova li garrbet u wkoll l-effetti tal-ordni li l-Qorti tista\` taghti dwar jekk l-okkupant jistax jibqa\` jistrieh aktar fuq it-thaddim tal-ligi attakkata. Minn kif wiehed jista\` jara, dawn il-kriterji huma firxa shiha li trid titqies f\`kull kaz ghalih u jiddependu hafna mic-cirkostanzi partikolari ta\` kull kaz;*

*Illi dwar il-kumpens dovut lir-rikorrent, madankollu, tqum konsiderazzjoni ohra. Ghalkemm ir-rikorrent harrek ukoll lill-intimati Ganado, izda dan ma jfissirx li huma l-istess intimati Ganado li jridu jhallsu lir-rikorrent il-kumpens li sejjer jinghata jew li jaghmlu tajjeb ghal ghazla li kienet taghtihom il-ligi. Kumpens bhal dak ghandu jbatih biss l-Istat minhabba li l-ksur li qed igarrab ir-rikorrent huwa l-effett dirett tal-ligi li ddahhlet bl-Att XXIII tal-1979. L-intimati Ganado nqdew b\`ligi li tathom jeddijiet godda li ma kellhomx fiz-zmien meta nghatat il-koncessjoni enfitewtika, izda ma ghamlu xejn biex jiksbu dan il-jedd b\`mod illegali. Fid-dawl tal-massima qui suo jure utitur neminem laedere videtur, l-Qorti ma tistax issib li l-intimati Ganado jridu jaghmlu tajjeb huma wkoll ghall-hlas tal-kumpens lir-rikorrent minhabba s-sejbien ta\` ksur tal-jedd fundamentali tieghu. Din il-fehma tinbena wkoll fuq il-fatt li l-ilment tar-rikorrent jirrigwarda ligi li jaghmilha l-Istat u mhux ic-*

*cittadin li, min-naha tieghu, ghandu jedd jinqeda biha fil-parametri taghha u safejn din ma titqiesx li qieghda tikser il-jedd fundamentali tas-sid;*

*Illi kif inhu mizmum u mghallem "fil-kaz ta` ligi leziva tad-drittijiet konvenzjonali jew kostituzzjonali, huwa l-Istat u mhux ic-cittadin li ghandu jirrispondi. Ghax huwa principalment l-obbligu tal-Istat, u mhux tal-inkwilin, li jassigura li d-drittijiet fundamentali tas-sid ma jinkisrux" (Kost. 24.2.2012 fil-kawza fl-ismijiet Louis Apap Bologna vs Kalcidon Ciantar et; u Kost. 6.2.2015 fil-kawza fl-ismijiet Sean Bradshaw et vs L-Avukat Generali et);*

*Illi meta wiehed iqis ic-cirkostanzi kollha li johorgu mill-provi mressqa u jhaddem dwarhom ir-regoli li dawn il-qrati minn zmien ghal zmien inqdew bihom f`kazijiet li jixxiebhu (Kost. 29.4.2016 fil-kawza fl-ismijiet Raymond Cassar Torregiani et vs Avukat Generali et), il-Qorti ssib li jkun xieraq li jithallas kumpens lir-rikorrent fis-somma ta` sebat elf euro (€ 7,000). Din is-somma qieghda tqis ukoll iz-zmien li r-rikorrent ha biex ressaq l-ilment tieghu quddiem il-Qorti (Ara Kost 25.5.2012 fil-kawza fl-ismijiet Josephine Mary Vella vs Direttur tal-Akkomodazzjoni Socjali et)."*

Fis-sentenza ta` din il-Qorti diversament ippreseduta fil-kawza fl-ismijiet **Sergio Falzon et vs Alfred Farrugia et** (op. cit.) inghad :-

*Ghal dak li jirrigwarda kumpens bhala rimedju ghad-danni non-pekunjarji ghas-sejbien ta` lezjoni tad-dritt fundamentali tar-rikorrenti kawza tal-applikazzjoni f`dan il-kaz tal-Artikolu 12(2) tal-Kap. 158, ir-rikorrenti ghandhom jedd ghalih meta tqis li ilhom mis-sena 1985 (izjed minn tletin sena) ma jiehdu kumpens gust ghall-fond taghom, u dan minkejja l-liberalizzazzjoni tas-suq fis-sena 1995 u li l-iskop legittimu sfuma mat-trapass taz-zmien. Tali jedd ghandu jigi kkalkulat mid-data tat-terminazzjoni tal-koncessjoni subenfitewtika, cioe`, mis-sena 1985.*

*Skont il-prospett tal-perit Tekniku il-rendita` mill-valur lokatizju fuq is-suq kellu jammonta ghal €93,217 ghas-snin*

*1985 sa 2016. Il-kera attwalment imhallsa kienet tammonta ghall-€16,765.50 (Tabella 4.0) (17%) Madanakollu hu assodat li r-rimedju kostituzzjonali ma jfissirx necessarjament ir-rimbors tal-valur shih fuq is-suq lis-sid. (Ara ad ez. ECtHR Kaz**__Ghigo vs. Malta__** 17 ta` Lulju 2008, #18; Kaz**__Edwards vs. Malta__**, 17 ta` Lulju 2008; #21; u l-QK fil-kaz **__Borg vs Mifsud__** sucitata) Specjalment meta bhal fil-kaz odjern, il-proprjeta` ma ittiehditx mill-Istat imma ghandha eventwalment tigi liberata favur is-sid minhabba r-rimedju li ser taghti din il-Qorti apparti l-kumpens.*

*Il-Qorti Kostituzzjonali f`**__Borg vs Mifsud__** citat supra, wara li qieset li:*

*"l-ghan principali tal-proceduri odjerni u ta` dak mitlub mir-rikorrenti, li huwa dak li jigi determinat jekk ir-rikorrenti sofrewx lezjoni tad-dritt fundamentali taghhom, u fil-kaz affermattiv, "… tiffissa kumpens xieraq ghal tali vjolazzjoni stante li r-rikorrenti baqghu dawn is-snin kollha [mill-1 ta` Dicembru 1998 sallum] minghajr il-pussess u t-tgawdija tal-proprjeta` taghhom" u taghti dawk ir-rimedji li l-Qorti jidhrilha xierqa inkluz li jiehdu lura l-pussess tal-fond proprjeta` taghhom…".*

*Ikkonsidrat li*

*"Din id-diskrepanza ta` 18% bejn il-kera fis-suq hieles u l-kera attwalment percepita mir-rikorrenti, timmilita favur ir-rikorrenti fil-komputazzjoni tal-kumpens ghax hija fattur relevanti hafna fil-komputazzjoni tal-estent tal-vjolazzjoni."*

*Izda dik il-Qorti kkonsidrat ukoll il-fattur li r-rikorrenti damu milli jipprevalu ruhhom mir-rimedju kostituzzjonali kif ukoll kkonsidrat ir-rimedju li kien ser jinghata b`dak il-gudizzju, li permezz tieghu l-intimati ma jistghux ikomplu aktar jistriehu fuq l-Att XXIII.1997 biex jibqghu jokkupaw il-fond de quo. Din il-Qorti ma taqbilx li ghandu jkun hemm tnaqqis dwar id-dewmien. (Dwar id-dewmien vide contra s-sentenza tal-Qorti Ewropea fil-kaz fl-ismijiet "Apap Bologna vs Malta" deciza r fit-30 ta` Novembru 2016 fejn irrimarkat:-*

*"46. The Court also takes issue with the fact that in line with domestic case-law, such compensation awards are reduced on the grounds that the applicants have instituted constitutional redress proceedings several years after they started suffering the violation complained of. In this connection, the Court notes, first and foremost, that domestic law does not impose a time-limit for the institution of constitutional redress proceedings. The legislator leaves the choice of timing to the applicant. Moreover, in circumstances such as those of the present case, the violation complained of is a continuing one. The Court thus finds that such reasoning is questionable in the light of the circumstances of the case and the domestic legal framework, which appears to give great latitude to individuals seeking redress for human rights violations.")*

*Ghaldaqstant wara li qieset bir-reqqa l-provi u s-sottomissjonijiet kollha, din il-Qorti qed tillikwida l-kumpens fl-ammont ta` hmistax-il elf ewro (€15,000) tenut kont il-valur tal-proprjeta` bhala liberu u vakanti (€145,000) u li l-izbilanc bejn il-kera imhallsa u l-valur lokatizju qed ikompli jizdied kull ma jghaddi z-zmien anke bl-applikazzjoni tal-emendi tal-2010. Dan il-kumpens ghandu jithallas mill-Intimat Avukat Generali flimkien mal-imghaxijiet bir-rata ta` hamsa fil-mija (5%) sad data tal-pagament effettiv."*

Fis-sentenza li tat fit-2 ta` Marzu 2018 fil-kawza fil-kawza fl-ismijiet **Thomas Cauchi et vs Avukat Generali et** il-Qorti Kostituzzjonali ghamlet dawn ir-rilievi :-

*"Nghaddu ghalhekk ghal-likwidazzjoni tal-kumpens ghall-ksur tad-dritt tal-atturi ghat-tgawdija ta`hwejjighom. Fost il-fatturi relevanti ghal-likwidazzjoni hemm dawn:*

- *id-diskrepanza bejn il-kera li l-atturi kellhom jedd ghalih taht il-Kap. 158 u l-kera li l-fond seta`gab fuq is-suq hieles;*
- *iz-zmien minn meta beda jinhass dan in-nuqqas ta` pro-porzjonalità;*

- *il-fatt li l-valuri moghtija mill-perit huma biss indikazzjoni tat-telf ekonomiku li setghu garrbu l-atturi u mhux prova ta` telf reali;*

- *il-fatt li, meqjus l-interess pubbliku u l-ghan socjali tal-ligi attakkata, il-kumpens misthoqq lis-sidien mhux bilfors ikun daqs il-kumpens shih li seta` kien dovut kieku wiehed kellu jistrieh fuq l-indikaturi tas-suq hieles;*

- *l-incertezza tal-atturi dwar meta jistghu, jew jekk jistghux qatt matul hajjithom, jiehdu hwejjighom lura, fin-nuqqas ta` mekkanizmu biex is-sidien jiehdu hwejjighom lura jew biex isir tqabbil bejn il-htigijiet tas-sidien u l-htigijiet tal-kerrejja, izda wkoll ir-rimedji li jistghu jaghtu lill-atturi s-setgha li jiehdu lura l-fond bis-sahha tad-dikjarazzjoni li l-konvenuta ma tistax tistrieh fuq il-ligi attakkata biex fuqha ssejjes titolu biex tibqa`zzomm il-fond;*

- *il-quantum ta` kumpens moghti mill-qrati f`kawzi ohra fejn ic-cirkostanzi kienu bejn wiehed u iehor jixxiebhu;*

- *il-fatt li ghandu jinghata kumpens kemm morali u kemm materjali ghall-ksur tad-dritt fondamentali.*

*20. Meqjusin dawn il-fatturi, din il-qorti hija tal-fehma illi kumpens ta` ghaxart elef euro (€10,000) jkun wiehed xieraq fic-cirkostanzi. Dan il-kumpens jinghata mhux taht l-art. 41 tal-Konvenzjoni, kif talbu l-atturi, ghax, kif sewwa osserva l-Avukat Generali, dak l-artikolu ma huwiex parti mil-ligi domestika; il-kumpens jinghata taht is-setgha ta` din il-qorti li taghhti rimedju ghall-ksur ta` drittijiet fondamentali. Dan il-kumpens jithallas mill-Avukat Generali, mhux mill-konvenuta Borg, billi din kull ma ghamlet kien li nqdiet b`jedd li kienet taghtiha l-ligi."*

Fid-decizjoni **Cassar vs Malta** (op. cit.) l-ECtHR ghamlet dawn l-osservazzjonijiet :-

*A. Damage*

*84. The applicants claimed 1,260,996 euros (EUR) in respect of pecuniary damage. That sum reflected (i) the rent due to them from 1998 to 2015 amounting to EUR 730,330 calculated on the basis of the valuation of an estate agent at EUR 3,500 per month, (EUR 42,000 annually) in 2015, projected backwards to the year 1998 based on two indices for property prices published by the Central Bank of Malta – by means of example, such projections show the rents for the respective years as follows: EUR 6,857 annually in 1988, EUR 18,476 in 1998 and EUR 41,649 in 2008; (ii) EUR 502,006 in simple interest at 8% (capped so as not to exceed the rent of a particular year); and (iii) EUR 28,660 (supported by an architect`s report) in repairs needed to the property since the tenant had failed to take adequate care of the property. In this connection the applicants noted that as things stand, they will remain suffering the effects of the violation even after the Court judgment, for an unspecified amount of years to come. In this light they also considered that their claim of EUR 54,000 in respect of non-pecuniary damage already suffered, representing EUR 2,000 annually since 1988, should be upheld in full.*

*85. The Government submitted that if a violation were to be found a declaration to that effect would suffice. In any event, they considered that the valuations were exorbitant, speculative and not based on an architect`s report. They noted that the property had been purchased in 1988 at EUR 25,600 it had therefore hardly been imaginable that it could now have a rental value of EUR 42,000 annually. Indeed if it had to be divided over the years, their claim in rent amounted to around EUR 27,000 annually which would surely not reflect the rental value in the eighties and nineties. They further considered that since the applicants had accepted rent until 2008, their claim should only refer to the subsequent years. Moreover, the tenant had deposited rent for the period between 2009-15 amounting to EUR 2,796 which had to be deducted from the award of compensation. As to interest the Government noted that under domestic law, interest was due only on amount*

*liquidated, which was not the case here. Moreover a rate of 8% was far beyond any commercial rate of interest currently available in the banking sector in respect of deposits. As to the structural works the Government considered this clam unproven and hypothetical. Lastly, the Government considered that an award under this head should not exceed EUR 10,000, which would be EUR 2,123.66 annually over six years, and an award for pecuniary damage should not exceed EUR 4,000.*

*86. The Court notes that the applicants are entitled to compensation in respect of the loss of control, use, and enjoyment of their property from around 2000 to date. The Court notes on the one hand that the rent suggested by the Government is not based on any valuation or other criteria, and appears to be a simple division of an aleatory sum they proposed. On the other hand, while the applicant`s valuation is based on an estate agent, and was not accompanied by an architect`s report, the domestic court found that EUR 3,000 as opposed to the EUR 3,500 alleged by the applicants appeared reasonable. However, the Court also notes that the comparators used by the estate agent refer to renovated buildings with high quality finishing and furnishing. While no information has been submitted as to the quality of the interior of the applicants` property the Court observes that the applicants claim that their property needs repairs as it has not been well taken care of (see paragraph 84 above). Thus, the latter cannot be considered to be in the same condition and at the same rental value as the former. Therefore, the Court considers that the valuation submitted by the applicants is on the high side, but may nonetheless provide a relevant indication and workable basis.*

*87. In assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It further notes that from 2008 onwards, the Court found the legitimacy of the aim pursued highly questionable (see paragraph 53 above) and*

*thus does not justify a reduction compared with the free market rental value (compare,* ***Zammit and Attard Cassar****, § 75; and* ***Amato Gauci****, § 77, both cited above). It further takes note of the sums already received by the applicants and those, following 2008, which were deposited in court and therefore remain retrievable, which are being deducted from the award.*

*88. In the present case the Court must, however, also take note of the fact that the applicants bought the property when it was already subject to such restrictions, and therefore it considers that the purchase price at the time reflected such restrictions. While the applicants consider that the Government`s claim to that effect was unsubstantiated (see paragraphs 37 and 38 above), the Court notes that according to the evaluations submitted by the applicants, the property in 1988, date when they purchased it, had a rental market value of EUR 6,857 annually. The Court observes that such a sum in rent would not be appropriate for a property purchased in the same year at EUR 25,600, if that were its real sale value. In consequence it must be accepted that the limitations on the property affected the purchase price.*

*89. The Court reiterates that an award in respect of pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he or she would have enjoyed had the breach not occurred (see, mutatis mutandis,* ***Kingsley v. the United Kingdom*** *[GC], no. 35605/97, § 40, ECHR 2002-IV). It therefore considers that interest should be added to the award in order to compensate for the loss of value of the award over time (see* ***Runkee and White v. the United Kingdom****, nos. 42949/98 and 53134/99, § 52, 10 May 2007). As such, the interest rate should reflect national economic conditions such as levels of inflation and rates of interest (see, for example,* ***Akkuş v. Turkey,*** *9 July 1997, Reports of Judgments and Decisions 1997-IV, § 35;* ***Romanchenko v. Ukraine****, no. 5596/03, 22 November 2005, § 30, unpublished; and* ***Prodan v. Moldova****, no. 49806/99, § 73, ECHR 2004-III (extracts)). It notes that*

*the applicants claimed the statutory rate of eight per cent, and the Government`s objection in that respect. The Court considers that a rate of five per cent interest is more realistic (see **Amato Gauci**, cited above, § 78, and **Ghigo v. Malta** (just satisfaction), no. 31122/05, § 20, 17 July 2008) thus a one-off payment at 5% interest should be added (see **Anthony Aquilina**, cited above, § 72, in fine).*

*90. Lastly, it is not for the Court to award the claim concerning renovation work which was not entered into by this Court.*

*91. The Court, thus, awards the applicants the sum of EUR 170,000 jointly.*

*92. The Court further considers that the applicants must have sustained feelings of anxiety and stress, having regard to the nature of the breach. It therefore awards EUR 3,000 jointly in respect of non-pecuniary damage.*

Premessa din il-gurisprudenza, meta tigi biex tillikwida l-kumpens (ghad-differenza ta` r-raguni ghall-vjolazzjoni) il-Qorti m`ghandhiex toqghod biss fuq id-diskrepanza bejn il-kera attwalment percepita mir-rikorrenti u l-valur lokatizju ta` l-fond fis-suq hieles. Ghalkemm huwa fattur ewlieni, mhuwiex l-uniku ghaliex hemm fatturi ohra li ghandhom effett mitiganti fuq il-quantum tal-kumpens.

Il-fatturi li jidderminaw l-entita` tal-kumpens huma :-

i) L-interess generali li jillegittimizza l-intervent legislattiv ;

ii) L-isproporzjon bejn il-kera attwalment percepita mir-rikorrenti u dik li setghet tkun percepita fis-suq hieles li kieku ma kienux applikati d-disposizzjonijit tal-Kap 158. Ghalkemm dan il-fattur sejjer jittiehed in konsiderazzjoni, l-istima tal-prezz tas-suq ghandu jitqies bhala kriterju ndikattiv mhux assolut.

iii) Il-prezz li bih kien akkwistat il-fond.

iv) Il-fatt illi l-fond de quo kien akkwistat mir-rikorrenti kif soggett ghall-kirja, diga` vigenti, favur l-intimati Camilleri.

v) Il-fatt li l-mezzanin jinsab fil-kantuniera ta` bejn zewg toroq go Tas-Sliema.

v) L-incertezza dwar meta r-rikorrenti jkunu jistghu jiehdu lura l-pussess battal tal-fond.

vi) Iz-zmien relattivament qasir li r-rikorrenti damu jgarrbu l-istat ta` sproporzjon qabel mexxew bil-kawza tal-lum. Tant hu hekk li l-kawza tal-lum saret sena u nofs biss wara l-akkwist mir-rikorrenti tal-fond de quo.

Ghaliex kull kaz huwa kkaratterizzat mill-isfond u l-fattispeci partikolari tieghu, ma hemmx uniformita` fil-*quantum* tal-kumpens li jigi likwidat mill-qrati taghna.

Mir-rapport tal-perit tekniku, l-isproporzjon bejn il-kera li tithallas u l-valur lokatizju fis-suq hieles jirrizulta bl-aktar mod evidenti.

Minkejja d-diskrepanza, din il-Qorti tirriafferma li l-kumpens bhala rimedju kostituzzjonali mhuwiex ekwivalenti ta` bilfors ghal rimbors favur is-sid tal-valur shih fis-suq hieles.

**Qieset l-assjem ta` l-fatti u cirkostanzi tal-kaz, id-dikjarazzjoni taghha li kien hemm vjolazzjoni tal-Art 1 Prot 1 tal-Konvenzjoni, u l-linja ta` gurisprudenza traccjata mill-qrati taghna u mill-ECHR.**

**Qieset ukoll il-fatt illi r-rikorrenti xtraw l-post meta kienu jafu li dan kien soggett ghall-kirja favur l-inkwilini u li f`qasir zmien minn meta akkwistaw il-post taw bidu ghall-procediment tal-lum.**

**Tenut kont ta` kollox, ghall-fini tar-raba` talba, il-Qorti hija ta` l-fehma li filwaqt li ma tarax li hemm lok illi favur ir-rikorrenti jigu likwidati danni morali, fl-istess waqt tghid li favur ir-rikorrenti ghandha tigi likwidata s-somma globali ta` <u>EUR 10,000</u> bhala danni pekunarji.**

**Ghar-rigward tal-hames talba, din is-somma hekk likwidata ghandha tithallas biss mill-Avukat Generali li jirrapprezenta l-Istat.**

**<u>Decide</u>**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrenti, wara li tat konsiderazzjoni lill-eccezzjonijiet tal-intimati, billi qeghda taqta`u tiddeciedi hekk :-**

**Tichad l-eccezzjoni numerata wiehed (1) tal-intimati Camilleri.**

**Tichad l-eccezzjoni numerata tnejn (2) tal-intimat Avukat Generali.**

**Tilqa` l-eccezzjoni numerata tlieta (3) tal-intimat Avukat Generali.**

**Tilqa` l-eccezzjonijiet numerati tnejn (2), erbgha (4) u tlettax (13) tal-intimati Camilleri.**

**Tilqa` l-eccezzjonijiet l-ohra fil-mertu tal-intimati safejn dawn l-eccezzjonijiet jirrigwardaw l-allegata vjolazzjoni tal-Art 37 tal-Kostituzzjoni ta` Malta.**

**Tichad l-eccezzjonijiet l-ohra fil-mertu tal-intimati safejn dawn l-eccezzjonijiet jolqtu l-vjolazzjoni tal-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.**

**Tipprovdi dwar l-ewwel (1) talba kif dedotta limitament billi tiddikjara u tiddeciedi li d-disposizzjonijiet tal-Kap 158 tal-Ligijiet ta` Malta citati fl-istess talba jaghtu dritt ta` rilokazzjoni lill-intimati Camilleri.**

**Tichad il-bqija tal-ewwel talba.**

**Riferibbilment ghat-tieni (2) talba, tiddikjara u tiddeciedi illi r-rikorrenti ma garrbu l-ebda vjolazzjoni tad-dritt taghhom ghall-propjeta` ta` l-fond 39, bl-isem "Detroit", Creche Street, Sliema, hekk kif dan il-jedd huwa mhares bl-Art 37 tal-Kostituzzjoni ta` Malta, ghalkemm tiddikjara u tiddeciedi li garrbu vjolazzjoni tad-dritt taghhom ghall-propjeta` ta` l-istess fond hekk kif dak id-dritt huwa mhares bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.**

**Riferibbilment ghat-tielet (3) talba, tiddikjara u tiddeciedi illi l-intimat Avukat Generali wahdu huwa responsabbli sabiex ihallas kumpens lir-rikorrenti ghall-vjolazzjoni tal-jedd fondamentali taghhom kif fuq inghad.**

**Riferibbilment ghar-raba` (4) talba, tillikwida favur ir-rikorrenti s-somma globali ta` ghaxart elef Ewro (€10,000) bhala danni pekunjarji ghall-vjolazzjoni subita tad-dritt taghhom ghall-propjeta` kif imhares bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.**

**Riferibbilment ghar-raba`(4) talba, tiddikjara u tiddeciedi li mhijiex sejra tillikwida danni morali favur ir-rikorrenti ghall-vjolazzjoni subita tad-dritt taghhom ghall-propjeta` kif imhares bl-Ewwel (1) Artikolu tal-Ewwel (1) Protokoll tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali.**

**Riferibbilment ghall-hames (5) talba, tordna lill-intimat Avukat Generali sabiex ihallas lir-rikorrenti s-somma hekk kif fuq likwidata.**

**Tordna li l-ispejjez ta` din il-kawza ghandhom jithallsu in kwantu ghal nofs mir-rikorrenti u in kwantu ghal nofs mill-intimat Avukat Generali.**

**Tordna lir-Registratur tal-Qorti sabiex kif appena din is-sentenza tghaddi in gudikat jibghat kopja taghha lill-Ispeaker tal-Kamra tad-Deputati kif irid l-Art 242 tal-Kapitolu 12 tal-Ligijiet ta` Malta.**

**Onor. Joseph Zammit McKeon**
**Imhallef**

**Amanda Cassar**
**Deputat Registratur**